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Supreme Court of the United States

October Term, 1939.

No. 719.

THE COLORADO-NATIONAL BANK OF DENVER, a National Banking Association,

Appellant,

vs.

HOMER F. BEDFORD, as Treasurer of the State of Colorado,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO.

BRIEF OF APPELLANT.

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No. 719.

THE COLORADO NATIONAL BANK OF DENVER, a National Banking Association,

Appellant,

vs.

HOMER F. BEDFORD, as Treasurer of the State of Colorado,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO.

BRIEF OF APPELLANT.

STATEMENT OF CASE.

Jurisdiction is invoked in this cause upon an appeal from the judgment of the Supreme Court of the State of Colorado in a suit where is drawn in question the validity of a statute of the said State on the ground of its being repugnant to the Constitution or laws of the United States, and the said state court decision was in favor of its valid-

ity. (Judicial Code, Sec. 237, as amended, U. S. C. A., Title 28, Sec. 344.)

The statute is known as the Colorado Public Revenue Service Tax Act of 1937, now found in Session Laws of Colorado, 1939, Chapter 158. It is lengthy, and we have therefore copied it in the Appendix hereto.

Briefly, the said service tax act levies and imposes upon specified services a tax of two per cent of the amount paid for such services, or two per cent of the value thereof. Among the services taxed are "services rendered or performed by any person engaged in any of the following businesses: * * * banks, finance companies; trust companies and depositories; * * * and any other business of a similar nature in which services (not professional) are performed on a price or fee basis." The act also provides that there shall be exempt from taxation under it "all services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or laws of the United States." (See Sec. 7 (a).)

With reference to this exemption provision, the State Treasurer, by his rules, regulations and interpretations, held that the State is prohibited, by Federal authority, from taxing all services performed by national banks (as well as State), and all of their services are, therefore, exempt from taxation, except that safe-deposit services are not a banking function, and so are taxable.

By another provision of the act, the term "taxpayer" is defined to "mean any person obligated to account to the State Treasurer for the tax collected or to be collected or due the State under the terms of the act." By other provisions, also, one rendering or performing taxable services, among other things, is obligated: to procure a license to conduct his business; to make returns and account to the State Treasurer; to charge the user of services for the tax; and himself to pay the tax, less three per cent of its amount, whether or not collected from the

user. In addition, fines and penalties, civil and criminal, are provided for defaults and delays, a first and prior lien is imposed upon all of the property of the performer of services, to secure his payment of the tax to the State, whether or not he collects it from the user; and distraint may be had against him as the "taxpayer."

This action was commenced in the District Court of the City and County of Denver, Colorado, by Homer F. Bedford, as Treasurer of the State of Colorado, the plaintiff, against The Colorado National Bank of Denver, the defendant. It was brought under the so-called "Uniform Declaratory Judgments Law." (1935 C. S. A., Ch. 93, Sections 78 to 92.) Other defendants were originally included, but the suit was later dismissed as to them.

The purpose of the suit was to test the applicability and validity of the said Service Tax Act as against the appellant national bank, and on behalf of the Treasurer to procure a decree that the bank's safe-deposit services are subject to the tax imposed by the act, that the act is valid as against a national bank, and that the bank must pay the said tax. It was the purpose of the bank's defense to procure a decree that the state is prohibited by the Constitution and laws of the United States from taxing the bank's services, and that the act, if applied to the bank's services, is invalid as repugnant to the Federal Constitution and laws.

The appellant national bank is not seeking any advantage over state incorporated banks. In this respect it agrees with the ruling of the Treasurer, that, under Colorado law, if the act is, in any respect, inapplicable or invalid against the national banks, the same ruling must apply to state banks.

The questions presented in this brief were raised by the Treasurer's Amended Petition (R. 1), the bank's answer thereto (R. 5), and the treasurer's demurrer to the said answer (R. 12). The parties stood upon their said pleadings. The District Court first held for the

bank, overruled the Treasurer's demurrer, and entered a judgment and decree accordingly (R. 16). Questions of law only, and no questions of fact, are involved.

As to this judgment and decree in favor of the bank, the Treasurer procured a review by a writ of error in the Supreme Court of the State of Colorado. The cause on error was first heard by six Justices sitting *en banc*, the seventh Justice not participating, and resulted on December 27, 1938, in an order of affirmance because the six Justices were equally divided (R. 18). Thereafter, and with the January, 1939, term of the said Supreme Court, a new Justice came on the bench, and a petition for a rehearing by the Treasurer was then granted. Additional arguments were then made and additional briefs filed in due time, and on April 17, 1939, the said Supreme Court handed down its decision and opinion, which has now become final, reversing the District Court and remanding the cause for further proceedings in harmony with its said opinion. In the consideration of the cause on rehearing, one of the Justices who had been in favor of the affirmance of the decision for the bank did not participate, and the new alignment of the court consisted of the three Justices who had been in favor of a reversal and the new Justice who went on the bench at the January, 1939, term, deciding for a reversal and the two Justices who had before participated and been for an affirmance dissenting, the other Justice who had been for an affirmance not participating. This opinion is reported under the title of *Bedford, Treasurer, v. The Colorado National Bank*, 104 Colo. 311, 91 Pac. (2d) 469, and is in the Record herein at page 19 et seq.

For want of a final judgment (See *Hinderlider v. La Plata River, etc., Co.*, 291 U. S. 650, 54 S. Ct. 557, and cases there cited), no appeal was then sought to the United States Supreme Court, and the case was remanded to the District Court, for further proceedings and the entry of a final judgment.

Upon the remand, the Treasurer caused the first declaratory judgment and decree to be vacated, the order overruling his demurrer vacated, his demurrer sustained, and presented the second and final declaratory judgment and decree (R. 35).

Upon the presentation of the said second judgment and decree, the bank objected and upon its entry excepted (R. 32), and its objections and exceptions are carried forward into the assignments of error upon this appeal.

The bank thereupon by writ of error procured a review in the Supreme Court of the State of Colorado of this last judgment and decree in the cause in the said court entitled The Colorado National Bank of Denver, a national banking association, Plaintiff in Error, v. Homer F. Bedford, as Treasurer of the State of Colorado, Defendant in Error, and numbered 14684 on the docket of the said Supreme Court.

On January 8, 1940, the Supreme Court of the State of Colorado handed down its decision (not yet reported) in the second cause on error (R. 41). This decision of January 8, 1940, and the judgment rendered in the Colorado Supreme Court thereon is the last and final judgment and is the judgment from which the bank is prosecuting this appeal.

Amended Petition for Declaratory Judgment.

The Treasurer's amended petition (R. 1) alleged, among other things, the following:

Par. IV. That the bank is a national bank;

Par. VI. That the State Treasurer had properly promulgated rules, regulations, and interpretations, of which provisions numbered 10 and 27 read:

> "10. BANKS. Services rendered or performed by banks were included in the act. It now appears

that the law is invalid as applied to national banks. Following the general principle of law and taxation now established to the effect that where a tax statute intended to apply state-wide to all banks, if invalid, as to national banks is invalid as to all state banks, the service tax is therefore invalid as to all banks, state and national. Provided, however, that where a bank or other similar institution, whose regular services are not subject to the service tax, owns or operates a taxable business or performs taxable services aside from and outside its regular business, such as the operation of safety deposit vaults, hotel, lodging house, real estate brokerage services, etc., such outside services are taxable and the bank must collect and remit the tax thereon."

"27. DEPOSITORIES. Such services rendered as the furnishing of safety vaults by depositories or banks come within the act, and the tax applies to the charge made therefor" (R. 2).

That the Treasurer had on July 27, 1937, and again on August 27, 1937, demanded of the bank, and it had refused, to collect or pay, the said service tax on its safe-deposit services, "or in any manner comply with said law."

Par. VII. That the bank is rendering depository services, taxable under the said law and regulations, which are reasonable, proper, and within the law, and the bank is "responsible and liable for said tax, whether collected from its customers or not, in the manner provided in the said act."

Par. VIII. That an actual controversy exists, because of the foregoing, and "the nature of such controversy is that the act in naming banks was, in effect, imposing a tax upon the banks in conflict with the federal laws and hence invalid as to banks" (R. 4).

Par. IX. That the Treasurer demanded and continues to demand that the bank "failing and refusing to so collect such tax (meaning the two per cent tax on its safe deposit services) from its customers, be held responsible and liable therefor in the manner provided, whether collected from its customers or not" (R. 7).

The petition prayed an adjudication that the bank's safe deposit services are taxable and that the act is valid as to the bank with respect to the said services, and for other relief.

The Bank's Answer.

The bank answered (R. 5) alleging among other things:

Par. 2. That it is an agency or instrumentality of the United States.

Pars. 3, 4 and 5. That it admits the demands, refusals, and controversy above mentioned, arising because the bank is a national bank.

Par. 6. That the bank's safe-deposit business is a part of its banking business; and the answer alleges in detail the facts relating to the incorporation of its vaults in its banking house, taxed with its fixtures as real estate, the bank's operation thereof itself, and not by a subsidiary company, with the supervision of the Comptroller of the Currency over its operation of that part of its business and his consideration of the pertinent expenses and earnings.

Par. 7. "That under and pursuant to the permission granted by the United States Revised Statutes, Section 5219, as amended (U. S. C. A., Title 12, Section 548), the State of Colorado has by law elected to tax and is taxing the Bank, on its net income, from the period commencing July 1, 1937, and that the said state, and political subdivisions thereof, have taxed and are taxing the Bank's real property to the same extent, according to its value, as

other real property is taxed; and that prior to July 1, 1937, the said state, and its political subdivisions, taxed the shares of the said bank under and pursuant to the first method of taxation granted and permitted by the said Section 5219, as amended."

Par. 8. "That the subject of this action and the matter in controversy is a suit of a civil nature, in equity, and arises under the Constitution or laws of the United States, or both."

Par. 9. That the bank is exempt from taxation under the Service Tax Act because of the provision thereof reading, "all services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or laws of the United States shall be exempt"; and if not exempt, the act is unlawful and unconstitutional, the answer then setting forth the detailed reasons of repugnancy to the Federal Constitution and laws, and especially because: (a) the bank is the "taxpayer," (b) the tax is on its banking business, (c) the bank must procure a license to conduct its business or be guilty of a crime, (d) fines and penalties are imposed upon it, (e) unless the bank makes returns, the State Treasurer may make them and fix the amount of the tax payable by the bank, (f) the act gives the State a first and prior lien on all of the assets of the bank contrary to Revised Statutes, Section 5242 (U. S. C. A., Title 12, Section 91), and (g) the act makes it criminal for the bank to refuse to pay the tax or to comply with the act from time to time (R. 8):

"That the bank, as a national bank, is a governmental agency or instrumentality of the United States; that the plaintiff in enforcing, or attempting to enforce, the said service Tax Act as to the bank, as hereinbefore alleged, is imposing a tax against the bank in contravention of the constitutional immunity of the United States and their governmental agencies and instrumentalities, and under color of the said Service Tax Act and under color of his

rulings, regulations or interpretations with respect thereto is seeking to deprive the bank of a right, privilege or immunity secured to it by the Constitution of the United States (R. 10); and

That it is discriminatory and improper for the Treasurer to attempt to apply the act to the bank's deposit services, when he has admitted and conceded that all of its other banking services are exempt from taxation under the act.

And the bank prayed that the court "determine and declare that under and by virtue of the Constitution and laws of the United States • • • all services performed by the bank, including its depository services, are exempt from tax under the Public Revenue Service Tax Act of 1937 of Colorado."

The Treasurer's Demurrer.

The Treasurer demurred (R. 12), generally, to the above answer, and the parties stipulated (R. 11) that they would stand upon their above pleadings.

The First Declaratory Judgment and Decree.

The District Court heard the demurrer and decided it against the Treasurer, and rendered a decree from which we quote the following:

> "That the defendant is a national banking association, organized and existing under and by virtue of the Constitution and the Acts of Congress of the United States of America, and as such is an agency or instrumentality of the United States; that the services performed by the defendant in operating safety deposit boxes and vaults are incident to, and an integral part of, its banking business, for the performance of which it was and is chartered and enfranchised as such governmental agency or instrumentality; that as to any service

tax imposed upon the said services under the Colorado Public Revenue Service Tax Act of 1937, the defendant bank as the one rendering or performing such services would be the taxpayer, or, if not, would be burdened by such a tax; and that, therefore, the said services are by Section 7 of the said act expressly exempt from taxation under it as 'services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or laws of the United States or the State of Colorado'" (R. 16).

The Second Declaratory Judgment and Decree.

After the reversal by the Colorado Supreme Court of the foregoing, the District Court, upon remand, entered its Second Declaratory Judgment and Decree (R. 35) in favor of the Treasurer, over the bank's objections and exceptions, which are carried forward into the assignments of error upon this appeal. The Second Judgment and Decree found, and concluded as a matter of law, and decreed, that the Service Tax Act:

"As applied to the depository services performed by the defendant bank, is not an unlawful interference with an instrumentality of the United States; that the following quoted paragraphs or sections numbered 10 and 27 of the rules, regulations and interpretations, prescribed and published pursuant to the said act by the plaintiff on or about June 10, 1937, and republished as amended, on October, 22, 1937, with respect to depository services performed by the defendant bank, are proper and valid; (Copying the said sections as set out in the amended petition, supra, at pages 5 and 6.)

"that the said depository services performed by the defendant bank are not exempt from the application of the said act under the provisions of Section 7 thereof; that the tax created by the

Service Tax Act is imposed, not upon the bank, but upon the user of the service, and does not violate U. S. Revised Statutes, Section 5219; U. S. C. A., Title 12, Section 548; and that the requirement that the bank collect and pay the same to the State Treasurer, in the manner provided in the act, is not an unconstitutional burden upon, nor does it unlawfully interfere with, the Bank as a governmental instrumentality; and accordingly, the court should now order, adjudge, decree and declare the law as hereinafter stated;

"NOW, THEREFORE, THE COURT DOTH ORDER, that the order heretofore entered herein overruling the demurrer of plaintiff to defendant's answer and the judgment and decree thereupon rendered and entered herein be, and they hereby are, vacated and set aside, and the said demurrer of plaintiff to defendant's answer be, and hereby is, sustained; and

"IT IS DECREED, DECLARED AND ADJUDGED:

"1. That the services performed by the defendant bank in operating safety deposit boxes and vaults, as described in the pleadings herein, are not exempt from taxation under the said Service Tax Act of Colorado; that the said services are taxable pursuant to the terms of the said act and within the provision of the said act governing depositories, and are within the said paragraphs or sections numbered 10 and 27 of the said rules, regulations and interpretations, and they, as well as the said act, relating to the said depository services, are proper and valid, in all respects, as to the duties, burdens, responsibilities, liabilities, fines and penalties imposed upon the bank, in performing the said depository services, to collect and account for, and to pay the said tax" (R. 36).

Assignments of Error.

As noted above, the bank, in the Colorado Supreme Court, on writ of error, procured a review of this Second Judgment and Decree. The Colorado Supreme Court, on January 8, 1940, affirmed (R. 41) (but decision not yet reported). From this affirmance judgment the bank has appealed. The bank has assigned six general specifications of error, with several subdivisions thereof (R. 43). All are intended to be urged. Without now repeating them, they are properly condensed into the more general classifications, which, with some of the leading citations thereon, are outlined in the following:

SUMMARY OF THE ARGUMENT.

I.

The immunity of national banks from state taxation.

Under this heading we present the point that national banks may be taxed only as permitted by Congress, and R. S. Sec. 5219, as amended, measures that permission.

R. S. Sec. 5219, as amended (copied in Appendix hereto).

McCulloch v. Md., 4 Wheat. 316, and some subsequent cases to and including.

Bank v. Bennett, 284 U. S. 239, 52 S. Ct. 133.

II.

The safe-deposit business of national banks is authorized by Congress.

Under this heading we present the point that the safe-deposit business of a national bank is a part of its nationally chartered banking business, and is a banking function.

Bank v. Dearing, 91 U. S. 29, and like cases.

R. S. Sec. 5136, as amended.

R. S. Sec. 5228.

National Bank v. Graham, 100 U. S. 699, and like cases.

Bank of Calif. v. Portland, 157 Ore. 203, 69 Pac. (2d) 273.

1. The safe deposit business of a national bank is immune from state taxation, whether the bank or the user of its services be the taxpayer.

Under this subheading we present the point that the Congressional grant of tax immunity extends not only to the tangible property, shares, and income of a national bank, but also to all of its nationally chartered functions, including its safe-deposit business; that the case is entirely different from those in which an *implied* immunity may be claimed or asserted; and that the tax is prohibited even though it be paid or payable by the user of the bank's services.

Fed. Land Bank v. Crosland, 261 U. S. 374, 43 S. Ct. 385.

Pittman, Clerk, v. H. O. L. C., 60 S. Ct. 15 and earlier cases upon Congressional grants of immunity.

Baltimore Nat'l Bank v. Com., 297 U. S. 209, 56 S. Ct. 417.

State Tax Com. v. Baltimore Nat'l Bank, 174 Md. 403, 199 Atl. 119.

2. Under the Colorado Service Tax Act, the bank, as the performer of safe-deposit services, is the taxpayer, and is expressly exempted by Sec. 7 (a) of the act.

Under this subheading we present the point that the express exemption in Section 7 (a) of the act from taxation of safe deposit services, should be applied to avoid Constitutional repugnancy, because, by the Act and decisional law, the bank is, in law, the "taxpayer."

Sec. 7 (a) of the Service Tax Act.

Various other provisions of the act.

New Orleans v. Houston, 119 U. S. 265, and other like cases decided by state courts, under sales tax laws including:

Opinion of the Justices, 88 N. H. 500, 190 Atl. 801.

In re Atlas Television Co., 273 N. Y. 51, 6 N. E. (2d) 94.

Doby v. Tax Com., 234 Ala. 150, 174 So. 233.

Covington v. Tax Com., 257 Ky. 84, 77 S. W. (2d) 386.

III.

The burdens imposed by the act upon performers of services are repugnant to the United States Constitution and Laws.

Under this heading we present the point that, assuming the bank is not the taxpayer and the tax burden is not unlawful, nevertheless the other burdens which the act then imposes upon the bank, as the performer of national banking functions, render the act unconstitutional. From this it follows that the Act should be construed as making the performer of services the taxpayer, and as exempting all intra vires national banking services from taxation.

Various sections of the act.

In re Opinion of the Justices (supra).

Various constitutional provisions.

Allgeyer v. La., 165 U. S. 578, 17 S. Ct. 427, and like cases.

Clement Nat'l Bank v. Vermont, 231 U. S. 120, 34 S. Ct. 31.

IV.

Unlawful discrimination.

Under this heading we present the point that the Treasurer's application of the act, upheld by the State Supreme Court, is discriminatory, and against the United States Constitution.

Bedford, Treas., v. Johnson, 102 Colo. 203, 78 Pac. (2d) 373.

THE ARGUMENT.

I.

THE IMMUNITY OF NATIONAL BANKS FROM STATE TAXATION.

That national banks are federal agencies or instrumentalities created by governmental powers vested in Congress by the United States Constitution, has been recognized and reiterated in all of the cases from *McCulloch v. Md.*, 4 Wheat. 316, to the present time.

It is equally well settled that these banks are immune from state taxation, except as expressly permitted by Congress, and that R. S., Sec. 5219, as amended, now measures the full power of the states to tax them, their shares, property, franchises and business, and expressly excludes the states from all other methods or forms of taxation against them.

The decisions on these general principles are many. We cite a few of the most outstanding of the earlier cases, and some that are recent.

McCulloch v. Md., supra.
Osborne v. Bank, 9 Wheat. 738.
Owensboro National Bank v. Owensboro, 173 U. S. 664, 19 S. Ct. 537, which reviews many of the earlier cases.
Bank of California v. Richardson, 248 U. S. 476, 39 S. Ct. 165.
Bank v. Adams, 258 U. S. 362, 42 S. Ct. 323.
First National Bank of Guthrie v. Anderson, 269 U. S. 341, 46 S. Ct. 135, 138.
Bank v. Bennett, 284 U. S. 239, 241, 52 S. Ct. 133.

The Treasurer conceded this principle, in this litigation, by the following quoted from his brief filed in the Colorado Supreme Court: "*Of course, if the Bank is the one upon whom the tax is imposed, the Service Tax Act in so imposing the tax upon a bank would contravene and be contrary to the Federal Statutes* (R. S., Sec. 5219)."

II.

THE SAFE-DEPOSIT BUSINESS OF NATIONAL BANKS IS AUTHORIZED BY CONGRESS.

Another principle, now axiomatic, is that national banks have such powers as are defined in the Acts of Congress and such as are necessary or implied for carrying into effect the powers expressly granted. This is clearly stated in *Bank v. Dearing*, 91 U. S. 29:

> "The national banks organized under the Act (the banking Act) are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which exists for creating them *Congress is the sole judge.*
>
> "Being such means, * * * the state can exercise no control over them, nor in anywise affect their operation, *except insofar as Congress may see proper to permit.* Anything beyond this is an abuse, because it is the usurpation of power which a single state cannot give." (Italics are ours.)

We quote the following from *Davis v. Bank*, 161 U. S. 276, 16 S. Ct. 502, 503:

> "The provision of the New York banking law that debts due savings banks by an insolvent bank shall be preferred is repugnant to Rev. St., Secs. 5236, 5242, requiring the assets of an insolvent national bank to be distributed ratably among the creditors, and is therefore inapplicable in the case of a national bank.
>
> "National banks are instrumentalities of the federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties or control

the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the federal government to discharge the duties for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court."

To the same effect is the following from *Easton v. Ia.*, 188 U. S. 220, 23 S. Ct. 288, 293:

> "Congress, having power to create a system of national banks, is the judge *as to the extent of the powers which should be conferred upon such banks,* and has the sole power to regulate and control the affairs of their operations; * * * it must be obvious that their operations cannot be regulated or controlled by state legislation." (Italics are ours.)

From this it follows that if Congress has authorized national banks to conduct a safe-deposit business, Congress being the sole judge as to that necessity, no state or court may say that such a business is not an essential part of the business of national banks.

The safe-deposit or depository business of the appellant national bank is within, and a necessary incident of, its franchise and occupation as a bank. This follows from the Congressional grant of powers, from historical recognition as to the scope of the banking business, and from the adinitted facts in this case. By *R. S., Sec. 5136,* as amended *(U. S. C. A., Title 12, Sec. 24)* it is provided that national banks, among other things, shall have power

> "Seventh. To exercise, by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking."

and included in this same paragraph is the following:

> "*Provided*, that in carrying on the business commonly known as the safe-deposit business, the association shall not invest in the capital stock of a corporation organized under the law of any state to conduct a safe-deposit business in an amount in excess of 15 per centum of the capital stock of the association actually paid in and unimpaired and 15 per centum of its unimpaired surplus."

The deposit business is also recognized in *R. S., Sec. 5228 (U. S. C. A., Title 12, Sec. 133)*, which provides that after default, and upon notice from the Comptroller, it is unlawful for a national bank to "prosecute the business of banking, except to receive and safely keep money belonging to it, and to deliver special deposits."

In *National Bank v. Graham*, 100 U. S. 699, this court considered the congressional grant of banking powers, and the historical aspect of what constitutes banking, and at pages 703, 704, approved and quoted *Patterson v. Syracuse National Bank*, 80 N. Y. 82, as follows:

> "The phrase 'special deposits,' thus used, embraces deposits such as that here in question. Patterson v. The Syracuse National Bank, Court of Appeals of New York (recently decided and not yet reported). In that case it was said 'a reference to the history of banking discloses that the chief, and in some cases the only, deposits received by the early banks were special deposits of money, bullion, plate, etc., for safe-keeping, and to be specifically returned to the depositor; and such was the character of the business done by the Bank of Venice (the earliest bank) and the old Bank of Amsterdam, and the same business was done by the Goldsmiths of London and the Bank of England, and we know of none of the earlier banks where it was not done."

In line with, and in further recognition of, the foregoing are the following excerpts from *Texas Pacific Railway Co. v. Pottorff*, 291 U. S. 245, 54 S. Ct. 416.

> Page 253—"The measure of their powers is the statutory grant; and powers not conferred by Congress are denied. For the act under which national banks are organized constitutes a complete system for their government. Cook County National Bank v. United States, 107 U. S. 445, 448, 2 S. Ct. 561, 27 L. Ed. 537; California Bank v. Kennedy, 167 U. S. 362, 366, 17 S. Ct. 831, 42 L. Ed. 198; First National Bank in St. Louis v. Missouri, 263 U. S. 640, 44 S. Ct. 213, 68 L. Ed. 486."

> Page 259—"The modern deposit grew out of the older form of deposit in which the fund was held separate and intact, and the sole purpose of the deposit was safe-keeping. Safe-keeping is still a very important function of deposit banking."

To the same effect is *Bank of California v. Portland*, 157 Ore. 203, 69 Pac. (2d) 273 (certiorari denied, 302 U. S. 765, 58 S. Ct. 476), in which the Washington Supreme Court reviewed at some length the historical aspect of the safe-deposit business of banks, and held that it was an integral part of the nationally chartered banking business, and that a city license tax against it was invalid.

In paragraph 6 of its answer (supra), admitted by demurrer, the appellant national bank alleged, generally, that its safe-deposit business "is an incident to or integral part of its banking business, and requisite for the safe and convenient attainment of the purposes for which it was created under the authority and laws of the United States"; and the answer, in support of this general allegation, further alleged the detailed facts such as: the bank's ownership of its banking house, taxed, with its vaults and deposit boxes, as real estate; the construction of its vaults within its banking building, and the use of

part thereof by the bank itself and part thereof for service to its customers; the cost of constructing its vaults with their fixtures; the supervision by the Comptroller of the bank's operation of this part of its business; and his consideration, in determining the condition of the bank, of the value of its vault assets and earnings.

Notwithstanding the foregoing, the State Treasurer determined and ruled that in operating this part of its business, the bank is performing "services aside from and outside its regular banking business"; and then, using this erroneous premise, held this service taxable (see paragraphs 10 and 27 of the Treasurer's regulations, at pages 5 and 6, supra).

So far as we know, there is no decision of any court (other than of the Colorado Supreme Court in this cause) holding that the safe-deposit business of any bank, state or national, is not part of its banking business. Because the Treasurer ruled that all other services of national banks are not taxable we feel that this erroneous ruling, that the safe-deposit business is not banking, was responsible for this controversy and litigation.

The Colorado Supreme Court proceeded as it did upon the assumption that it could determine (and it did determine) that "a depository service rendered by a national bank is purely incidental to, and not a necessary incident to, its banking business," and "Safety deposit business service is clearly separable from the banking business as a governmental instrumentality under the Federal law." (See *104 Colo. 321.*)

It did so, although the law is, as we understand the decisions of this court cited above, that Congress is the sole judge of what are necessary incidents to the national banking business, that the determination of Congress is made by its grant of the power, and that all powers of national banks are granted to them as governmental instrumentalities. Otherwise state authorities might de-

termine that the escrow business, the collection business, the trust business, and many other services of a national bank, other than receiving deposits or loaning of money, are not necessary incidents to the national banking business. Then, instead of Congress, the sole source of national banking powers, being supreme, and establishing a single rule controlling all of the national banks in all of the states, we might have different rules established by different courts in the various states.

We know of no reason to place the depository services of a national bank in a category separate and distinct from all of its other services. As no decisions to the contrary have come to our attention we confidently proceed upon the theory that the safe-deposit or depository business of a national bank is part of the business or occupation which a national bank is chartered by Congress to conduct.

1. *The Safe-Deposit Business of a National Bank is immune from State Taxation, Whether the Bank or the User of Its Services be the Taxpayer.*

The Colorado Supreme Court also held that the depository services of the bank are taxable under the Service Tax Act, because the bank is not the taxpayer or the one "upon whom the service tax is imposed." (See 104 Colo., pages 313-320, answering the first question posed by the court.)

This was also erroneous because, even so, the tax is on a federal chartered function, business or occupation of the bank. The proper question is: may the service be taxed? To determine who must pay it does not answer the question.

The Service Tax Act provides:

> "Seetion 5. From and after the effective date of this act *there is hereby levied and imposed upon the services specified in this act* and measured by the

amount paid therefor and there shall be collected and paid:

* * * * * *

"(c) *A tax equivalent to two (2) per cent of the value of services rendered or performed by any person engaging or continuing in any of the following businesses:* * * * *banks, finance companies; trust companies and depositories;* except as to interest on money loaned, stock or commission brokers or agents; and any other business of a similar nature in which services (not professional) are performed on a price or fee basis." (Italics are ours.) (See pages 67 and 68, infra.)

Clearly it is the service that is taxed. The Act is a pure revenue law enacted under the state's taxing power to procure funds for the support of the state government. It does not purport to be founded upon the police, or any power, other than the taxing power, of the state. As determined by the Colorado Supreme Court (*Rinn v. Bedford*, 102 Colo. 475, 476, 84 P. (2d) 827) the tax so levied and imposed is an "excise" tax. Within that general term, it is a "business" or "occupation" tax. In our judgment, if the right to do business is a property right, it is also a property tax. As the service is taxed, and the performance of the service is within the bank's charter powers, its business, occupation and franchise is burdened with the tax, no matter who is required to, or does, pay it.

In *Federal Land Bank v. Crosland*, 261 U. S. 374, 43 S. Ct. 385, it was contended that, because the Land Bank could pass on to borrowers a tax of Alabama (characterized by the Alabama court as a "recording fee") imposed upon the recording of mortgages (which as to the Land Bank had been granted immunity from state taxes by Congress) the tax was valid. But this court said at page 378: "It is said that the lender may collect the money in advance from the borrower. We do not perceive that this makes any difference * * *. Whoever pays it, it is

a tax upon the mortgage and that is what is forbidden by the law of the United States."

So, too, in this cause, whoever pays the service tax, it is a tax on the business and occupation, and so upon the franchise of the bank, and "that is what is forbidden."

The last decided case upon this subject is *Pittman, Clerk, v. Home Owners' Loan Corporation*, 60 S. Ct. 15, and we believe it is determinative of this cause. There, too, it was contended that because the federal instrumentality could pass the tax on to borrowers, the tax should be permitted. But this court held to the contrary, and said:

> "Petitioner insists that the tax is not discriminatory; that it does not impose a burden upon the Home Owners' Loan Corporation; and that if the Act of Congress be construed as conferring an immunity, it went beyond the power of Congress, as Congress cannot 'grant an immunity of greater extent than the constitutional immunity.'
>
> "We assume here, as we assumed in *Graves v. New York ex rel. O'Keefe*, that the creation of the Home Owners' Loan Corporation was a constitutional exercise of the congressional power and that the activities of the Corporation through which the national government lawfully acts must be regarded as governmental functions and as entitled to whatever immunity attaches to those functions when performed by the government itself through its departments. *McCulloch v. Maryland*, supra, pp. 421, 422, *Smith v. Kansas Title Co.*, 255, U. S. 180, 208, 209; *Graves v. New York ex rel. O'Keefe, supra.* Congress has not only the power to create a corporation to facilitate the performance of governmental functions, but has the power to protect the operations thus validly authorized. 'A power to create implies a power to preserve.' *McCulloch v. Maryland*, supra, page 426. This power to preserve

necessarily comes within the range of the express power conferred upon Congress to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States. Const. Art. I, Sec. 8, Par. 18. *In the exercise of this power to protect the lawful activities of its agencies, Congress has the dominant authority which necessarily inheres in its action within the national field. The Shreveport case,* 234 U. S. 342, 351, 352. The exercise of this protective power in relation to state taxation has many illustrations. See, e. g.; *Bank v. Supervisors,* 7 Wall. 26, 31; *Choate v. Trapp,* 224 U. S. 665, 668, 669; *Smith v. Kansas City Title Co.,* supra, page 207; *Trotter v. Tennessee,* 290 U. S. 354, 356; *Lawrence v. Shaw,* 300 U. S. 245, 249. In this instance, Congress has undertaken to safeguard the operations of the Home Owners' Loan Corporation by providing the described immunity. As we have said, we construe this provision as embracing and prohibiting the tax in question. *Since Congress had the constitutional authority to enact this provision, it is binding upon this court as the supreme law of the land. Const. Art. VI."* (Italics are ours.)

It is interesting to observe that in the present cause the Colorado Supreme Court undertook to overrule Congress, though this court says that Congress' action in such a matter is binding upon it.

The two above cases reaffirm a doctrine often expressed throughout the history of this court. In *McCulloch v. Md.*, supra, the tax declared illegal was in form an excise tax relating to the bank's services in issuing notes, etc. At the very end of its opinion the court said (page 436):

"This is a tax on the operation of the bank, and is, consequently, a tax on the operation of an instrumenality employed by the government of the Union to carry its powers into execution."

So too, in the present cause, the service tax is on the operation of the bank's safe-deposit department, and is prohibited.

This same contention, that the burden of the tax could have been passed on to others, and that, for such a reason, it should have been valid against the Federal instrumentality asserting immunity, could have been made in other cases. *Western Union Telegraph Co. v. Texas,* 105 U. S. 460, is an example. The Telegraph Company was a federal agency or instrumentality in certain respects, and was engaged in interstate commerce. Texas undertook to tax its messages, even though sent in these two fields, at the rate of 1 cent for a "full message" and of ½ cent for less than a "full message." This court held the tax illegal and said (page 465):

"Where the burden of a tax falls on a thing which is the subject of taxation, the tax is to be considered as laid on the thing rather than on him who is charged with the duty of paying it into the treasury. * * * Clearly, * * * this must be a tax on the messages."

In *Brown v. Md.,* 12 Wheat. 419, a state law providing a license tax on the sale of imported packages in their original form, was held illegal as an interference with foreign commerce, and the court said at pages 444, 448:

Page 444.—"It is true the State may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he

deals, or the thing itself is taxed through his person. So a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not a right to do, because it is prohibited by the constitution."

Page 448—"The distinction between a tax on the thing imported and on the person of the importer, can have no influence on this part of the subject. It is too obvious for controversy that they interfere equally with the power to regulate commerce."

Leloup v. Mobile, 127 U. S. 640, also involved state taxation of the Western Union Telegraph Company, and held a license tax imposed on the company was invalid. Pertinent excerpts from the opinion follow:

Page 644—"It is proper to note that the license tax in question is purely a tax on the privilege of doing the business in which the Telegraph Company was engaged."

Page 645—"Can a state prohibit such a company from doing such a business within its jurisdiction unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies, and prohibit the transaction of such business altogether." • • •

"We fail to see how a State can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business, is a tax on the occupation; and a tax on the occupation of doing a business is surely a tax on the business."

The opinion then approves *Brown v. Md.*, supra, and overrules *Osborne v. Mobile*, 16 Wall. 479, and says further at page 648:

> "In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax * * * on the occupation or business of carrying it (meaning interstate commerce) on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress" (citing many cases).

California v. Pacific Railroad Co., 127 U. S. 1, 40, 41, is another case of about the same time. It involved the the validity of a state "franchise" tax upon a congressionally created corporation. This court held the tax invalid and said at pages 40, 41:

> "No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise * * *.
>
> "In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? Taxation is a burden and may be laid so heavily as to destroy the thing taxed, or render it valueless. * * * Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it, is not only derogatory to the dignity, but subversive to the powers of the government, and repugnant to its paramount sovereignty."

The right to carry on a business is a property right. When the right is in a corporation it is within its franchise emanating from the government who charters it. From this, it follows that a so-called license tax, in such a case as this, is, within the meaning of granted immunity, a franchise, occupation or business, and property tax. Additional cases holding such "license" taxes invalid, as against national banks, because they are taxes on a governmental instrumentality, are:

Third National Bank of Louisville, v. Stone, 174 U. S. 432; 19 S. Ct. 759.

Shelbyville v. Bank, 272 Ky. 559, 114 S. W. (2d) 719.

and the often quoted and old case of *Pittsburg v. Bank*, 55 Pa. St. 45, in which the court said at page 48:

> "They (meaning national banks) are mere creations of the national government to whom alone they are responsible, and are as entirely independent of state legislation or state interference as the army and navy, and the mint, and the judicial tribunals of the United States."

As we construe and understand the Colorado Supreme Court's decision in this cause, the court considered the case as though immunity from state taxation would not interfere with the instrumentality's services to the government. It considered the case in the light of:

James v. Dravo Contracting Co., 302 U. S. 134, 58 S. Ct. 208, and

Graves v. N. Y. ex rel. O'Keefe, 306 U. S. 466, 59 S. C. 595.

State Tax Commission v. Van Cott, 306 U. S. 511, 59 S. C. 605.

In those cases immunity had not been determined by Congress, and the immunity, if any, must be implied from actual governmental interference. Cases of *implied*

immunity and *expressed* immunity are entirely different. In the latter cases, as exemplified by *Pittman, Clerk, v. H: O. L. C.*, supra, Congress determines the governmental policy, its determination is controlling, and any court's inquiry into the question of *actual impairment* of the governmental instrumentality's services to the government is of no avail. This is a case of the latter kind.

The difference between these two kinds of cases or situations is illustrated by *Baltimore Nat'l Bank v. State Tax Com.*, 297 U. S. 209, 56 S. Ct. 417, and *State Tax Com. v. Baltimore Nat'l Bank*, 174 Md. 403, 199 Atl. 119. In the first case, a national bank asserted an *implied immunity* from state taxation as to preferred shares held by Reconstruction Finance Corporation. This court, affirming the Court of Appeals of Maryland, refused to recognize the asserted immunity. Thereupon, by an act of March 20, 1936 (U. S. C. A., Title 12, Sec. 51 d), Congress granted an immunity from taxation as to shares of national banking associations held by Reconstruction Finance Corporation. The taxing authorities of Maryland still attempted to tax them; and in the second case, the Court of Appeals of Maryland held that the congressional grant of immunity controlled.

By numerous decisions in an unbroken line, some of them cited above, R. S., Sec. 5219, as amended, has been held to expressly exclude all state taxation of national banks, except to the extent and in the form in the section provided. Cases on implied immunity are not in point. The Colorado court said (104 Colo. page 323), "There is nothing in the Service Tax Act which incapacitates the bank from discharging its duties to the government," and; "that, after all, is the test." From this it is apparent that the Colorado court failed to consider the controlling feature of this cause—a Congressionally granted immunity, and thus, perhaps unintentionally, overruled Congress in a matter where it is supreme; and it is also apparent that it did so on the basis of "implied immunity" cases which, in this cause, we submit, are not applicable at all.

We cannot overemphasize the distinction that, in our opinion, is made in the decisions of this court between "implied immunity" cases and the cases where there is a Congressional grant of immunity.

This distinction, which the Colorado Supreme Court overlooked, is exemplified by *McGoldrick, Comptroller, v. Berwind-White, etc. Co.*, 60 S. Ct. 388, decided January 29, 1940. In that case, no Congressional grant of immunity was involved. Instead, immunity from the City of New York sales tax was asserted under Section 8 of Article I of the United States Constitution, declaring that "Congress shall have power * * * to regulate commerce with foreign nations, and among the several states * * *." The majority opinion expressly distinguishes the case from, and prevents its application to, the present cause by this statement: "We can find no adequate ground for saying that the present tax is a regulation which, *in the absence of Congressional action*, the commerce clause forbids." (Italics are ours.) Had there been "Congressional action" forbidding the tax, as there is in R. S., Sec. 5219, as amended, relating to state taxation of national banks, the cited case would have been similar to the present cause. Then, to uphold the tax, it would have been necessary to overrule *Federal Land Bank v. Crosland* and *Pittman, Clerk, v. H. O. L. C.*, both supra, each decided by a unanimous court. Neither of these last two cases is mentioned in either the majority or dissenting opinions, and as the opinion in the Pittman case was also rendered at the October, 1939, term of court, it must follow that this court treated the McGoldrick-Berwin-White case as wholly different from the other two.

Very significant is the following quoted from the McGoldrick-Berwin-White case:

> "If the vendor must pay the tax whether or not he can recoup the amount from the purchaser, and the tax, as here, is assessed against the vendor,

it would seem inadmissible to defend the tax upon the ground that it is a tax upon the purchaser."

Although the foregoing is quoted from the dissenting opinion, there is nothing in the majority opinion in disagreement with the quotation or the thought expressed by it. As we read the case, the disagreement was upon other principles.

This last quotation is upon, and brings us to, our next subject.

2. *Under the Service Tax Act of Colorado, the bank as the performer of safe-deposit services is the "taxpayer," and is exempted by Section 7 (a) of the act.*

Section 7 (a) of the act provides:

> "All services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or laws of the United States, * * * shall be exempt from taxation under this act."

Thus the Act, by its own wording presents a federal question, final determination of which must rest with this court; and, in considering and answering this question, this court must necessarily further consider how and in what respects the act affects this federal agency and instrumentality, and its position and status under the act, in order to apply or withhold application of the federal prohibition. This is true, also, because Colorado has not been at all consistent in either its characterization, interpretation, or application of the act.

In paragraph 10 of his rules, regulations, and interpretations of the act, the Treasurer in considering Section 7 providing the above exemption, held that the law is *invalid* as applied to national banks (see pages 5 and 6, supra), undoubtedly, because they are federal agencies or instrumentalities. But in the same paragraph, he reserves from invalidity the depository services of national banks. The

Colorado Attorney General, by paragraphs VII and IX of the amended petition in this case (R. 3 and 4), took the same position—that the only tax which the bank is required to collect or pay for services performed by it in its individual capacity, as distinguished from a trust capacity, is upon its depository services. And the Colorado Supreme Court held that this paragraph 10 and the said ruling are proper and valid and affirmed the District Court's judgment and decree so providing, and in addition required the bank to collect, account for, and *pay the said tax upon depository services, only, because the "bank does not carry any of the tax burden unless it refuses to comply with certain terms of the act."* (See 104 Colo. 320, 91 Pac. (2d) 473.)

Here we have an anomaly—the Colorado court adjudicating the *validity* of the tax on the bank's depository services because, in its opinion, the bank is not the taxpayer, and adjudicating the *invalidity* of the tax on all of the other services of the bank, because it is a federal instrumentality or agency, even though as to all services (depository and all others) the bank is a federal agency or instrumentality and its statutory tax burden is, in each instance, identical. In other words, as to depository services, the act is valid, but, even though the identical circumstances and assigned reasons for validity exist as to all other services, as to them the act is invalid. It seems to us that this is a haphazard discrimination against depository services without anything in the act, or in any law that we know of, to call for it.

The bank is either the taxpayer or not the taxpayer as to all of its banking services. No discrimination can be made to depend upon the particular kind of banking service performed. The act purports to tax all banking services. The act says in Section 5: "There is hereby levied and imposed upon the services specified in this act * * * a tax equivalent to two per cent of the value of serv-

ices rendered or performed by any person engaging or continuing in any of the following businesses: * * * banks, finance companies; trust companies and depositories."

It also purports to exempt all services which the State is prohibited from taxing. A very good and sufficient reason for applying this exemption to all of the bank's services, including depository services, is because, by the Act, the bank is made the taxpayer, and by the United States Constitution and laws the state is prohibited from taxing it.

Within the authority of *Federal Land Bank v. Crosland*, supra, and the cases there cited, this is a case where this court is not bound by the state court's ruling that the bank is not the taxpayer. In the cited case, this court held that it was not bound by the state court's determination that the required payment was a *"recording fee,"* itself considered the State statute and determined that it was a *"tax"* on mortgages. A state court may not circumvent the United States Constitution and Supreme Court decisions by an erroneous "characterization" of any part of a state statute, challenged as repugnant to the Constitution.

We, therefore, respectfully urge this court's consideration and determination of whether or not, under the Service Tax Act, the bank as the performer of depository services is the taxpayer. Note the following provisions of the Service Tax Act (printed in full in the appendix to this brief):

(1) That the taxpayer is defined as the one "obligated to account to the State Treasurer for taxes collected or to be collected or due under the terms of this act" (see Section 2 (e)), and by subsequent provisions it is the *performer* and not the *user* of services who is so obligated.

(2) That the taxpayer may take credit against subsequent taxes due from him, when the charges for his service, as to the tax paid, are "represented by accounts found

to be worthless and actually charged off for income tax purposes" (see Section 2 (h)).

(3) That it is unlawful for one performing a taxable service to do so without first procuring a license (see Section 4 (a) (b) and (g)), but the Colorado Supreme Court has held this provision is invalid as against the bank, and is separable from the other provisions (104 Colo. 315-316, 91 Pac. (2d) 471).

(4) That the tax is "*levied and imposed upon the services specified in the act,*" including "services rendered or performed by any person in * * * the business of * * * banks, finance companies; trust companies and depositories" (see Sections 5 and 5 (c)).

(5) That the *performer* of services is liable and responsible for the tax imposed upon his taxable services. (See Section 3, making it a misdemeanor "for any person performing said services to fail to collect * * * the tax levied by this act"; and see Section 6, providing that "every person rendering or performing services shall be liable and responsible for the payment of the entire amount of the said 2% tax imposed and payable upon his total taxable services rendered or performed"; and see Section 9 (b) imposing upon the performer of taxable services a penalty of 10% and interest at 1% per month if he should fail to pay the tax when due; and see also Section 12 (g) providing that the Treasurer may sue "the vendor" and "recover at law the amount of such tax, penalty and interest.")

(6) That the one performing taxable services must make returns, and should he fail to make a return, the Treasurer may make an estimate, and thereon compute and assess the tax due against the "taxpayer" (the performer) (see Sections 6 (a) and 12 (b)).

(7) That contrary to R. S., Section 5242 (U. S. C. A., Title 12, Section 91), the act imposes a first and prior

lien upon all property of the performer to secure the payment of the tax by the performer upon all of his taxable services (see Section 11 (a)).

(8) That for the unpaid "taxes, penalties, and interest," the Treasurer may file a notice of lien against all of the real and tangible personal property of the performer of services, called "the taxpayer," and this lien may be foreclosed by sale upon a warrant of the Treasurer against the property of "the tax debtor" (Sections 12 (c) and (d)).

(9) That the tax imposed by the act is in addition to all other licenses and taxes (Sec. 16).

(10) And it is unlawful and a misdemeanor for "any person rendering or performing services" to refuse to make the required returns and to "fail and refuse to make payment of any taxes * * * due the state," and the *performer* may be punished by fine or imprisonment, or both (Secs. 17 and 18).

It is significant that the performer of services, who alone must "account" to the state, is expressly named the "taxpayer," and all remedies provided in the act for the enforcement of collection are directed against the performer and his property. *Nowhere in the act is the state given any remedy against the user of services or against his property.* This feature of the Colorado law is unique. The only remedy at all given against the user is that *the performer* may add the tax to his bill "and when added such tax shall constitute a part of such value of service or charge, shall be a debt from the user to the person rendering or performing service until paid and shall be recoverable at law in the same manner as other debts" (Sec. 6 (b)). *The state may not even sue the user.* Significant, also, are the Treasurer's allegations that the bank is *liable* for the tax, "*whether collected from its customers or not*" (see paragraphs VII and IX of his petition, R. 3-4); and the District Court decreed (affirmed by the Colorado Supreme

Court), confirming the Treasurer's said position, that the bank is liable "to pay the said tax" (R. 37, and page 11, supra).

As we understand the adjudicated cases upon this subject, the "taxpayer," in the legal sense, under any tax law, is the one who is *primarily liable or responsible for the payment of the tax.* This was directly held in *New Orleans v. Houston,* 119 U. S. 265, 279-280. It appears in that case that the Louisiana State Lottery Company, by a special charter granted by the state, had been exempted from all taxes in excess of $40,000 annually. Thereafter, the state attempted to levy and assess an additional tax upon the shares of the company. The law provided that *the tax should be paid by the company,* and that the company should be entitled to collect the amount thereof, pro rata, from its shareholders. The state contended, as the Treasurer in the cause at bar contends, that the company was not the taxpayer. But this court held that the company was the taxpayer, because of its primary liability, and said, at pages 279 to 280:

> "A tax such as that sought to be imposed upon the company by the appellees, is a tax upon the corporation within the meaning or prohibition of its charter, *because it is compelled to become surety for taxes nominally imposed upon its stockholders and is made liable primarily for their payment; a payment which, in the first instance, must be made out of the corporate property, without other recourse than an action against individual stockholders to recover the amounts advanced on their account.* (Italics are ours.)

In this cause, under the Treasurer's ruling, sustained by the state court, the bank is primarily and absolutely liable (and the user is not) and must pay the tax, out of its funds, to the state; and its only recourse is to sue the user, and, if eventually it is permitted "to charge off for income tax purposes" the amount of the tax so paid and

not collected, then the amount so paid "may be credited upon a subsequent payment of the tax" (see Sec. 2 (h)).

The question has arisen in several states as to who is the taxpayer under various sales tax laws. These laws generally differ from one another, in many important features; but it has been invariably held (1) that the seller is the taxpayer if he is liable for the payment of the tax, whether he collects it or not, from the buyer, and (2) that the buyer is the taxpayer, if the seller's liability is conditioned upon his collection of the tax from the buyer, the seller then being an agent of the state. The Colorado act is in the first above classification.

We might rest our argument of this subject upon the following, which is quoted from *McGoldrick, Comptroller v. Berwind-White, etc. Co.*, supra, except that we have substituted in parentheses, the words "performer" and "user" for "vendor" and "purchaser," respectively:

> "If the *(performer)* must pay the tax whether or not he can recoup the amount from the *(user)* and the tax is assessed against the *(performer)*, it would seem inadmissible to defend the tax on the ground that it is a tax upon the *(user)*."

Some of the cases, in harmony with the above quotation and with the theory and reasoning of *New Orleans v. Houston*, supra, are:

People v. Herberts, 3 Calif. Ap. (2d) 482, 39 Pac. (2d) 829;

Roth Drugs v. Johnson, 13 Calif. Ap. (2d) 720, 57 Pac. (2d) 1022;

West Co. v. Johnson, 20 Calif. Ap. (2d) 95; 66 Pac. (2d) 1211.

National Ice, etc. Co. v. Fruit Express Co., 11 Calif. (2d) 283, 79 Pac. (2d) 380, 383-384;

In re Opinion of the Justices, 88 N. H. 500, 190 Atl. 801;

Pierce Oil Co. v. Hopkins, 282 Fed. 253;
Texas Co. v. Wilkinson, 21 Fed. Sup. 771, 778;
In re Atlas Television Co., 273 N. Y. 51, 6 N. E. (2d) 94;

In the last cited case, the court said:

"We might agree with that conclusion (that the purchaser is the taxpayer) if the local law did not contain other provisions which indicate that the obligation imposed upon the vendor is in the nature of a tax. He must file a return of his receipts from sales. Section 5. The duty of payment to the city is laid upon the vendor, not the purchaser. His liability is not measured by the amount actually collected from the purchaser but by the receipts required to be included in such return. Section 6. He must pay the tax even if failure to collect is due to no fault of his own. * * *

"It (the city) has imposed a tax as sovereign and to meet a need which concerns the welfare of the state. It has provided that the vendor of property must pay the tax to it. Though the vendor is required, at least in most cases, to collect the tax from the purchaser 'for and on account of the city,' the purpose of that provision is to place the incidence of the tax immediately on the consumer. The city can collect only from the vendor. The vendor's obligation to pay the tax is not measured by the amount collected nor dependent upon failure to exercise the diligence in collection which would be required of an agent."

Doby v. Tax Commission, 234 Ala. 150, 174 So. 233, should also be included among the above. We mention it specially because the Colorado Supreme Court cited *Long v. Roberts & Son*, 234 Ala. 570, 176 So. 210, in support of its opinion.

To understand what was held in *Long v. Roberts & Son,* supra, it is necessary to also consider *State Tax Commission v. Hopkins,* a companion case, 234 Ala. 556, 176 So. 210, and *Doby v. Tax Commission.* The question in the Long-Roberts case was whether certain sales which also involved services, were within the Alabama sales tax law. The court, in the Long-Roberts case, adopted the opinion in the Hopkins case and approved and adopted that part of the dissenting opinion of Gardner, J., relating to sales to counties. The court thus expressly approved the Doby case and it said (at page 217 of 176 So.):

> "In the strict and proper sense the tax is on the seller, and he is properly in such a sense to be denoted as the taxpayer. Doby's Case, supra. * * * In the Doby Case, supra, it was expressly stated that the seller is the taxpayer, and he it is who is required to take out the license, make the return, keep the record, and pay the tax to the state tax commission."

Consider now the direct holding and statement of the court in the Doby case. As quoted from 174 So. 235, it is as follows:

> "The retailer is the 'taxpayer,' the person liable to the state for the tax. He is the person required to take out the license under Section 3, the person required to make returns and pay the tax to the State Tax Commission under Sections 5 and 6; the person required to keep records under Section 8; the person on whose personal property a lien is declared as security for the tax under Section 9."

With due respect to the Colorado Supreme Court, we submit that it did not correctly appraise the decisions when it said that the great weight of authority is in the direction of holding that the buyer is the taxpayer, even though the seller is primarily and absolutely liable and must pay the tax to the state, whether he collects it or not from the buyer.

Further evidence of the court's error in this respect is its citation of *Breaux Ballard v. Shannon,* 271 Ky. 553, 112 S. W. (2d) 996, and *Covington v. Tax Commission,* 257 Ky. 84, 77 S. W. (2d) 386.

As the Ballard case follows and approves the Covington case, a consideration of the Covington case disposes of the other. The Kentucky Court very clearly holds that the buyer is the taxpayer because the seller is not required to pay the tax to the state *until he collects it* (quite different from Colorado, where he is *required* to pay it *whether he collects it or not*). Note these excerpts from the opinion in the Covington case in 77 S. W. (2d) at pp. 388-390:

> "In defining 'gross receipts' upon which the tax is exclusively levied, the words are restricted to sales for which the seller has received the consideration, either at the time of making the sale, or by payment of accounts of his customers to whom he extended credit. In other words, no tax is collectible from the merchant or seller until he collects the price of the commodity that he sells while engaged in the activity in which the sale was made. From that provision alone it would seem to appear that the clear import of the statute, and also the legislative intent, is and was to make the merchant or seller only a collector of the tax from his customers, * * *.
>
> "(4) The conclusions we have reached and so far expressed are also authorized and justified from the history of the statute under consideration from the time of its introduction in the Legislature until it was finally enacted in its present form, and which it is competent for courts to consider in construing statutes containing apparently ambiguous language, * * *. We find that it is admitted in briefs, and shown by the journal of the two Houses of the General Assembly, that the statute when first introduced was essentially one imposing the tax levied by it on the *merchant or seller,* and which is shown by the

unamended Section 3 and its various subsections. After the introduction of the act, various groups and organizations opposing its enactment appeared before the two legislative bodies, and to alleviate their objections the act was amended in several particulars, prominent among which was a shifting of the burden of paying the tax from the *merchant* or *seller* to the *consumer* or *buyer*, and which was accomplished by the amendatory provisions we have hereinbefore discussed. In this manner the statute as passed was turned around, so to speak, from the position it occupied when introduced, but without amending some of its sections or parts so as to harmonize with the newly assumed positions, and which produced the ambiguities encountered." (Italics by the court.)

It may be that an answer to this discussed question is unnecessary. The Colorado taxing authorities and court were apparently in a dilemma—on the one hand, if the performer of services should be considered the taxpayer, national banks' services under Section 7 (a) would be exempt from the tax; and, on the other hand, if the user should be considered the taxpayer, the benefit of the above enforcement provisions of the act, and particularly the distraint authorized, would be nullified. The Colorado General Assembly purposely defined the performer to be the taxpayer, so that the state might proceed against the performer and his property for the recovery of sizable sums—the aggregate tax on services to many customers. To proceed against the user would, in all but very exceptional instances, be extremely impractical. Thus, to proceed by distraint against a user of services charged or valued at $10.00, or even $100.00, to recover 20c or even $2.00, would be out of the question. The theory of the General Assembly, gathered from their wording of the act was consistent, logical, and valid. But discarding that theory, and to avoid the dilemma, the ruling was made that the bank, as the performer of services, is not the taxpayer

"unless it refuses to comply with certain terms of the act. To that extent, as applied to the bank (as a performer of services) *it is a taxpayer."* (See 104 Colo. 320, 91 Pac. (2d) 473.)

Thus, a tax burden is *conditionally* imposed upon national banks in Colorado. But the freedom from taxation, except as described in R. S. Sec. 5219, as amended, granted to national banks by Congress and recognized in all the decisions of this court, is *unconditional.* If states are permitted to *conditionally* tax national banks, otherwise than as provided by Congress, new avenues of taxation are open that may lead to unknown destinations.

Furthermore, congressionally exempted federal agencies and instrumentalities may not be so coerced into state taxation. In *Federal Land Bank v. Crosland,* supra, it was contended that liability of the Land Bank for the tax was optional with the bank, and that it would not be liable unless, at its option, it should, though not required, record its mortgages; but this court said:

> "The law of Alabama does make it necessary to record such deeds, because it overrides them if not recorded, in favor of any purchaser without notice. While it does so, it cannot say that it leaves the bank to record or not. *The bank has a choice it is true, but so has one who acts under duress."* * *
>
> "It is not necessary to cite cases to show that an act may become unlawful when done to accomplish an unlawful end." (Italics are ours.)

So, too, in the present cause, under the Colorado Supreme Court decision, the bank's officers and agents are subjected to fines and imprisonment, and its property to liens and filed notices of liens (of questionable validity, it is true) clouding its titles, and its records to the inspection and subpoena of state officials, *all unless it complies with the act, collects the tax for the state, and unless also it pays the tax to the state, whether collected or not.*

III.

THE BURDENS IMPOSED BY THE ACT UPON PERFORMERS OF SERVICES, AS AGENTS TO COLLECT THE TAX, ARE REPUGNANT TO THE CONSTITUTION AND ITS AMENDMENTS.

The question we will now consider is this: Is it constitutional to provide by law that any party, private or corporate, shall, without his consent, be conscripted, and caused to act, as a tax collection agent for the state, and be involuntarily subjected to any part or all of the duties and civil and criminal liabilities imposed by the act relating to both the performance and nonperformance of the agency? We believe that it is not constitutional; and are especially firm in our belief when the state seeks, under the act, to conscript a *federal* agency or instrumentality to perform such duties.

We start with the premise that the performer of services is not the taxpayer, but, as said in the Colorado Court opinion, "is merely the state's agent to collect." The following are the duties and liabilities then imposed by the act upon the agency:

(1) By Section 3, it is a misdemeanor for the conscripted agent "to fail to collect" the tax;

(2) By Section 4 (a), he must, on pain of being punished as a criminal, procure a license to act as an agent (in the case of banks, the duty to procure a license is deleted from the act by the court);

(3) By Section 6 (a) he must make returns and remit each month except that he may retain 3% of the taxes collected to cover his "*expense* (but no compensation for his services) in the collection and remittance of said tax," and these returns must be made in such manner and upon such forms as the state treasurer may prescribe;

(4) By Section 6 (d), it is unlawful for the conscripted agent to lead anyone to believe that he will not perform his agency nor collect the tax;

(5) By Section 9 (a), if he should, through error, pay less than the amount of the tax due (whether he has collected it or not), he must then, within ten days after written demand, pay the difference with interest at ½% per month;

(6) By Section 9 (b), if his failure to pay the full amount whether collected or not, is negligent or willful, then a penalty of 10% is added, and interest at 1% per month;

(7) By Section 9 (c), (d), (e) and (f), he must submit his books, papers and records to the Treasurer for investigation and himself attend and testify at hearings thereon;

(8) By Section 10, he must keep his books, papers and records for three years;

(9) By Section 11, his property is impressed with a first and prior lien for the payment of the tax, whether collected or not (but as to banks, the validity of this provision is left undecided in the opinion);

(10) By Section 12, at the election of the state, he may be made an involuntary trustee for the state, or he may be sued as for a debt, and judgment may be procured against him for the amount of the tax, whether collected or not; and the Treasurer may file notice of lien and distrain;

(11) By Section 16, the license and tax, imposed by the act, upon the conscripted agent is in addition to all other licenses and taxes;

(12) By Section 17, it is made a misdemeanor for the conscripted agent to refuse to make a return; and

(13) By Section 18, he may be fined $1,000 or imprisoned for six months, or both, for the above or any other misdemeanor as defined in the Act.

The act was adopted, as shown by Sec. 20, purely for revenue purposes. Any exercise of police power is not involved. We are therefore not concerned with those cases involving acts adopted under the police power where, as an incident to the prosecution of a business which a state may police and control, the particular business affected is required to do one or more of the things above specified. The policing and licensing of the gasoline and motor fuel sales business is an example.

Each of the above and other somewhat similar provisions contained in the Service Tax Act were designed to procure revenue and to enable the state treasurer to procure the proper account records and collections.

It is apparent to us that the Colorado General Assembly, in an attempt to design enforceable laws which would procure all possible revenue, and to provide valid enforcement methods therefor, purposely said, in Section 2 (e) of the Act:

> "The term 'taxpayer' shall mean any person obligated to account to the state treasurer for taxes collected or to be collected or due the state under the terms of this act"

The result of invalidity of even less severe enforcement provisions was directly determined and announced by the Supreme Court of New Hampshire, upon inquiries propounded by the New Hampshire legislature relating to a sales tax law then being considered, in *In re Opinion of the Justices*, 88 N. H. 500, 190 Atl. 801, at pages 804 and 805, as follows:

> "By the bill the tax is placed upon the purchaser. Although the seller is required to guarantee, collect, account for, and pay it, he is also required

to add it to the price of the article sold and may not assume or absorb or refund it. The duty thus devolved upon him to act as the collector of the tax without adequate compensation for the service a majority of us believe would be in derogation of due process as a confiscatory deprivation of his rights of equality. *It would not be a service incidental to the ascertainment of his own taxes.*

"The situation is not parallel with that of distributors of gasoline and other motor fuels who are required to pay the tax thereon although it is in finality a tax against the ultimate consumer. Such distributors must be licensed (Pub. Laws, c. 104, Sec. 1), and their duty to pay the tax is therefore a term of the license.

* * * * *

"If the bill were redrafted so as to place the tax on the retailer, the objectionable feature of his status as a tax collector would be eliminated." (Italics are ours.)

By expressly stating in the Service Tax Act that the performer is the taxpayer, the Colorado General Assembly did all that they could do to "eliminate" the objectionable feature of attempting to cause the performer to act as a tax collector. By judicial construction, in finding an *implied* intent reversing an *expressed* intent, the accomplishment of the General Assembly is nullified by the state court opinion in this case.

In our opinion, each and all of the enforcement provisions of the Service Tax Act are unconstitutional *if the user of services is the taxpayer* (but not if the performer of services is the taxpayer), because they then violate the following parts of the United States Constitution and Amendments, to-wit:

Art. I, Sec. 10. "No state shall * * * pass any law impairing the obligation of contracts."

Art. V of Amendments. "No person shall be • • • deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

Art. XIII, Sec. 1 of Amendments. "Neither slavery nor involuntary servitude, except as punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States."

Art. XIV, Sec. 1 of Amendments. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law."

Within the above constitutional provisions protecting a person's "liberty," it seems to us is the situation that, when an individual is forced to serve the state, whether it be for a month, a day, or longer, he is to that extent deprived of his right to carry on the calling and lawful occupation of his own choosing; and the authorities so state.

Thus, it was said in *Allgeyer v. Louisiana,* 165 U. S. 578, 17 S. Ct. 427 at page 431:

> "The 'liberty' mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; *to live and work where he will.*" (Italics are ours.)

The same thought is expressed in *Smith v. Texas,* 233 U. S. 630, 34 S. Ct. 681, at page 682:

> "Life, liberty, property, and the equal protection of the law, grouped together in the Constitution, are so related that the deprivation of any one of

those separate and independent rights may lessen or extinguish the value of the other three. In so far as a man is deprived of the right to labor, his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guaranty is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling."

In *Frorer v. People*, 141 Ill. 171, 31 N. E. 395, the court said: "The privilege of contracting is both a liberty and a property right." As it is a property right, corporations are protected under this constitutional clause. (See 11 Am. Jur. "Constitutional Law," Sec. 334, page 1145, and Note 13, and cases there cited, including *Pierce v. Society of Sisters*, 268 U. S. 510, 45 S. Ct. 571.) From this it follows that, as the right to barter for one's services and to fix the price therefor is a property right, a statute such as this which requires the performance of the services of a tax collector for the arbitrary sum of 3% of the amount which should, but may not, be collected *(as reimbursement for expenses, but not compensation for services)*; likewise contravenes these constitutional provisions; and the conscripting of one's services as a tax collector, with only a fixed allowance therefor, is the taking of private property for a public use without just compensation, because no provision or attempt is made to determine the value to the conscripted agent of his services performed as such collector. (See 11 Am. Jur., "Constitutional Law," Sec. 335, page 1147.)

As a corollary to the foregoing, it has been said that "the liberty to make contracts includes the corresponding right to refuse to accept a contract or to assume such liability as may be proposed." (11 Am. Jur., page 1153.) Under the Service Tax Act, as construed in the Colorado Supreme Court's opinion, however, the performer must

accept the employment of a tax collector and assume the attendant liabilities, both civil *and criminal.*

It cannot now be questioned that the privilege of contracting is both a liberty and a property right, protected by the federal Constitution; that every person has the right freely to deal, and to refuse to deal, with whomsoever he may choose; and no legislature of any state may, without his consent, make a contract (in this case, of employment as a tax collector) for him. (For many cases see citations to 11 Am. Jur., Sec. 339, pages 1153 to 1157.)

In addition to the protection afforded to all persons and corporations by the foregoing constitutional provisions and principles, national banks are protected against being conscripted as tax collectors, by the Acts of Congress, which are the "law of the land" and were adopted pursuant to the governmental powers conferred upon the Congress by Article I, Section 8, of the United States Constitution.

The validity of the enforcement provisions of the Service Tax Act does not seem to have been considered in the Colorado Court's opinion, except in this one sentence (104 Colo. 320, 91 Pac. (2d) 473): "While the bank is liable to the state for the tax, the act itself is so worded that the bank does not carry any of the tax burden unless it refuses to comply with certain terms of the act." This sentence considers only the "*tax burden,*" and not the other burdens and duties of the conscripted tax collector.

We are not unmindful of the severability clause of the act; that the validity or invalidity of the other burdens and duties (except procuring a license) is left open by the opinion, just as the validity of Section 11 relating to a first and prior lien is left open; and that each and all of the other enforcement provisions may be successively deleted, as unconstitutional in cases which arise under them. Such an answer begs the question. The General Assembly so

worded the act that each and all of these other provisions might stand, and, therefore, in considering who is the taxpayer, the state court should have also considered what effect its decision would have on these other provisions, and it should have harmonized its opinion with them, if possible, to the end that the entire act may stand as against performers of all services not exempted by the act.

We assume, for the purpose of this brief, that if the state has the right to regulate and license, or to tax, a particular business, and so to exercise its police power or its taxing power as to that particular business, as an incident to the exercise of either of those powers, it may require the one conducting that particular business to charge a tax to the user of the business, to collect the tax and to pay it to the state. As indicated in the New Hampshire case, supra, the duty, in such instances to collect and pay, is a term or condition of the license.

This principle, however, does not justify the conscription of a national bank as a tax collector. The Colorado Supreme Court's opinion specifically, and properly, holds (104 Colo. 315, 91 Pac. (2d) 471) that the state cannot license a national bank, and (104 Colo. 313-314, 91 Pac. (2d) 471) and that the state cannot tax it, except as provided in R. S., Section 5219, as amended. The attempt, therefore, to conscript a national bank as a tax collector is not as an incident to the exercise of the state's police power or taxing power over national banks.

Under the laws of many states, state or county tax collectors are employed, in some places at fixed salaries and in others for compensation based upon percentages of collections. We pose the question: May a national bank, under its charter powers prescribed by the federal law, accept the employment as such a tax collector? The answer is, of course, that it would be ultra vires. The next question then is: May a national bank be forced by a state into an employment which it could not accept voluntarily? And the answer must be that it may not.

The powers of national banks, other than the power to represent estates, trusts, etc., which is in a separate category, are defined and limited by R. S., Sec. 5136, Subd. 7 (U. S. C. A., Title 12, Sec. 24), quoted above.

It has many times been held that no state may add to, or deduct from these powers; that by this and other sections of the National Banking Act, Congress has provided a comprehensive and somewhat detailed system for the measure of authority, management, supervision and conduct of the business of national banks; and that any law of any state, even though adopted under a state's police power, within this field governed by Congress, is void unless *expressly* permitted by some other Act of Congress. *Meyers v. Exchange National Bank*, 96 Wash. 244, 164 Pac. 951, at 952 to 955, cites and quotes many United States Supreme Court cases and closes the subject by saying:

> "It is plain that under the federal decisions which we have reviewed the state cannot impose any liability upon a national bank by adding any powers to those expressly granted or fairly implied in the act authorizing its creation."

The Colorado Supreme Court did not consider the additional liability which it imposes upon national banks by adding to their powers that of acting as a tax collection agent, and in truth forcing it upon them. This is a question entirely distinct and apart from the question of immunity from taxation, either expressed or implied. It is the immunity granted by the United States Constitution and Acts of Congress from interference with the powers and liabilities which Congress has fixed for national banks.

It has been held and said, in many cases, that the symmetrical and complete scheme, with checks and balances, provided by Congress for national banks is designed so that a national bank "can assume no liability without acquiring assets to offset it." (7 Michie, Banks and Banking, page 217.) The said opinion in this case, however, imposes liability upon national banks for the

service tax on their depository services, even though they have not or cannot collect it, as agents, from their customers, and so have no asset to offset this newly state created liability.

Consider this—that a national bank, under its charter, may not become liable on an engagement to pay a debt of a third person when such person has no funds on deposit, out of which it might respond. (Bowen v. National Bank, 94 Fed. 925.) Yet, if the user of the bank's services is the taxpayer, such prohibited liability is cast upon the bank by the act. Consider this also—such liabilities would not appear in the reports to the Comptroller, he would have no knowledge of them, and thus would be nullified the safeguards of the Banking Act relating to examinations and the reports to be filed with the Comptroller, "exhibiting, in detail, a national bank's resources and liabilities." (R. S., 5211, U. S. C. A., Title 12, Sec. 161.)

See, also, upon this subject, *Farmers, etc. Nat'l Bk. v. Dearing, Davis v. Elmira Savings Bk., Easton v. Iowa,* and the *Pittsburg v. Nat'l Bk.* (all supra).

A case in this court on two aspects of this brief is *Clement National Bank v. Vermont,* 231 U. S. 120, 34 Sup. Ct. 31. In that case this court recognized, followed, and applied the principles upon which we stand. The state statute imposed a direct and primary tax liability on the owners of savings accounts in national banks in Vermont, *requiring the depositors* of the said accounts to make returns as to the said accounts and *to pay the tax thereon.* It further provided that a national bank might, at its option, *without being required to do so,* stipulate to return such accounts, and as agents for its depositors to pay the tax, and deduct the amount thereof from interest to be paid on such deposits. This court held the statute valid as to national banks, *because national banks were not made the taxpayers by the statute,* inasmuch as no direct or primary liability was imposed on them, *by the statute.* Note the following pertinent excerpts from the opinion:

"But it is apparent that, whatever objections may lie, the tax complained of is not laid upon the national bank itself, its property or franchise. *It is imposed upon the depositors; they alone are required to pay it.* If they fail to make returns, as provided by the statute, they are subject to penalty; *and both tax and penalty are recoverable by suit against them in the name of the state.* If they escape the tax, it is because of the Bank's stipulation. *If the Bank becomes liable, it is by virtue of its agreement, and not otherwise.* * * * *The statute lays the tax upon the depositor, in so many words.*" (In Colorado if the performer of services fails to make returns under the service tax act, the performer is subject to penalty; and both tax and penalty are recoverable from the performer, but are not recoverable by the state from the user.)

* * * * *

"National banks did not pay, and could not be compelled to pay, a franchise tax, or other tax upon their deposits.

* * * * *

"As to national banks, the state does not follow the course taken with the state institutions, and lay a tax upon the bank.

* * * * *

"The federal statutes relative to national banks constitute the measure of the authority of such corporations, and they cannot rightfully exercise any powers except those expressly granted or which are incidental to carrying on the business for which they are established. (Citing many cases.) These incidental powers are such 'as are required to meet all legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently.'"

IV.

UNLAWFUL DISCRIMINATION.

We deem it unnecessary to cite cases holding that a state taxing statute is unconstitutional which, either in its wording or in its application, is not uniform.

All of the rulings, and documents, quoted in this portion of our brief were considered by the Colorado Supreme Court, were quoted in the briefs submitted to it, and it took judicial cognizance of them. We deem it proper to give this court the same full knowledge of the situation as was possessed by the Colorado Supreme Court.

We have heretofore pointed out that the Treasurer's ruling, causing this controversy and litigation, that a national bank's safe-deposit service is "outside" its banking business, is not founded on anything in any law, statutory or decisional.

It did not conform to an official opinion given by the State's Attorney General on May 25, 1937 evidenced by his letter to certain national bank attorneys reading as follows:

"THE STATE OF COLORADO
Department of Law
Denver

May 25, 1937.

Lewis and Grant,
Attorneys at Law,
First National Bank Bldg.
Denver, Colo.

Gentlemen:

In reply to your letter of May 22, 1937, inquiring whether national banks incorporated under the laws of the United States of America and carrying on business in the State of Colorado are subject to the provisions of the Public Revenue Service Tax

Act of 1937, it is the opinion of this office that this act does not apply to national banks inasmuch as these banks are agencies of the United States government.

Yours very truly,

Byron G. Rogers,
Attorney General,
By Luke J. Kavanaugh,
Deputy Attorney General."

Although the Treasurer has proceeded in an attempt to tax one service performed by a national bank, he has officially ruled that services of other federal agencies are exempt. This is evidenced by his Article No. 72 of Bulletin numbered 3, issued July 26, 1937, reading as follows:

"72. SAVINGS, BUILDING & LOAN ASSOCIATIONS—Federal Savings, Building and Loan Associations and all State Savings, Building and Loan Associations which are members of the Federal Home Loan Bank, are exempt from state taxation and are therefore not subject to the Colorado State Service Tax, and *need neither collect nor pay such taxes.*" (Italics are ours.)

Notwithstanding the foregoing, on December 30, 1937, the plaintiff Treasurer made a written demand on all of the Denver Clearing House Banks to collect and pay the service tax on their charges for *fiduciary* services, as well as *depository* services. Each of the national banks belonging to the said association, including the appellant bank, then commenced against the Treasurer a declaratory judgment suit in the District Court of the United States for the District of Colorado, under the federal declaratory judgments law, because the amount of the tax then unpaid on fiduciary services, together with the tax on depository services, would exceed the jurisdictional sum of $3,000. Thereupon, the State Treasurer again ruled and conceded that banking services of these particular agencies

and instrumentalities are exempt, that fiduciary services are banking services, held, with the approval of the Attorney General, that his said demand was erroneous, wrote to each of the said banks a letter to that effect, and filed counterparts thereof with the Federal District Court to show that there was no controversy with respect to fiduciary services, and the jurisdictional amount of $3,000 was lacking. His said letter (a counterpart of which is quoted in his pleading in the Federal District Court and filed therein) to the appellant bank is as follows:

"Homer F. Bedford
State Treasurer
Ed Rich
Deputy Treasurer

STATE OF COLORADO
Division of Finance
Department of Finance and Taxation
Office of State Treasurer
State Capitol—Denver
April 19, 1938

Colorado National Bank,
Denver, Colorado.

The contents of a letter dated December 30th, 1937, signed by L. F. Crawford, Claims Department, addressed to you pertaining to the Colorado Service Tax Law, has been called to my attention. In that letter, you were notified to file with this office returns showing the amount of service taxes due the state, and remit the tax so due. Such letter contained a statement that the taxable services performed by banks which were subject to tax, included '*all services and activities rendered and performed in a fiduciary capacity,* and in the rental, maintenance and operation of safety deposit vaults, depositories, boxes and containers.' Such statement was erroneous.

This letter is to notify you of that error and make a correct statement of the demand made upon you.

Please be advised that it was the ruling of the State Treasurer on that date, and is still the ruling of the State Treasurer, that the only services known to be performed by banks which are subject to the Service Tax Act, are those performed in operating depositories or safety deposit boxes. The rulings of this office pertaining to such question remain the same as they were published in the booklet last October, found on page 53 thereof, being Special Rules numbered 10 and 11, reading as follows:

(The letter then quotes Secs. 10 and 11, which are quoted at page 2 of the record herein.)

Very truly yours,

Homer F. Bedford,
State Treasurer."

We have never been able to account for the varying positions officially taken by the Treasurer, without any legal foundation therefor whatever. Such applications of the law are certainly inconsistent, and, in our opinion, discriminatory. Discrimination exists also as between "depositories" in competition with each other.

As held in *Bank v. Portland* and other cases cited above, the relation between a bank and a customer of its safe-deposit vault service, is that of bailor-bailee. This is also the identical relation between other storagemen or warehousemen and their customers. In *Bedford, Treasurer, v. Johnson*, 102 Colo. 203, 78 Pac. (2d) 373, the Colorado Supreme Court held that the services of storagemen and warehousemen are not taxed. There is no difference between the services performed by a warehouseman or storageman and by a bank in their accepting, respectively, for deposit and storage in their vaults and rooms, of chests

or packages containing valuables, and of valuables generally. If such services are taxed at all, they must all be taxed; otherwise, if one should store such property in a bank, the service would be taxed, whereas if stored with a warehouseman, it would not. Such discrimination would permit destruction of a bank's depository business, and is prohibited by the Amendment to the United States Constitution condemning discriminatory taxation.

CONCLUSION.

We have presented, as we believe, valid reasons which lead to the conclusion that "the State of Colorado is prohibited from taxing under the Constitution or laws of the United States" the safe deposit services of a national bank. This, after all, is a federal question. The first judgment and decree of the Denver District Court, so deciding and so applying the exemption provision of Sec. 7 (a) of the act, was right and proper.

Beginning with the philosophy of McCulloch v. Maryland, and ever since the creation of national banks and the first adoption of what is now R. S., Sec. 5219, as amended, it has been the law of the land that states may not tax national banks, except as permitted by Congress, and that by that section Congress has permitted the forms and methods of taxation therein specified, and prohibited all others. Both Congress and the states have so treated the section and the decisions thereon. When, in the opinion of Congress, it became desirable, to keep abreast of the times, as income taxation became the vogue, Congress amended the section to permit state taxation of national banks' income and income from national bank shares. So too, it rests with Congress to say when and in what manner a state may otherwise tax any part of the business, safe-deposit or what not, of national banks.

To depart from this rule and to permit states, as their own legislatures or their own courts may deem proper, to

tax national banks and any part of the business of national banks, *unless* they assume and perform other liabilities and obligations which the states choose to impose, will encroach upon and may destroy the power of Congress, supposed to be supreme in this field. The facts attendant upon this litigation are an example. At first the state authorities conceded that the state could not tax any of the national banks' services. Then they changed their minds and decided to tax safe-deposit services. Shortly thereafter they made an attempt, which they quickly abandoned, when opposed, to tax the national banks' trust services. Logic, however, demands that they either may, or may not, tax all national banks' Congressionally authorized services. The district court believed, and so ruled in the first judgment and decree, that the prohibition extended to all services, and did not admit of any exception.

To us, the effort to distinguish between safe-deposit services is extremely strained and without any foundation in law. Strained, also, is the attempt to bottom this case upon decisions where only *implied immunity* was involved. Cases of implied immunity and cases of Congressional grants of immunity are not comparable. The reasons influencing decisions in the two classes of cases are entirely different. Because any particular court or judge might believe that immunity from taxation should not be implied except under circumstances very materially affecting governmental functions, is no reason that the same court or judge should not abide by and follow an act of Congress granting immunity even though governmental functions may be but slightly affected. *Pittman, Clerk, v. H. O. L. C.*, decided at this court term, is an example of our thought upon this subject.

We do not ask that this court usurp from the state court the decision of a local law or purely state question. What may be the United States constitutional or statutory prohibitions of state taxation, must ultimately be determined by this court. If the exemption of Sec. 7 (a) of the

act applies, and we believe it does, then the Colorado state courts are free to construe the Service Tax Act however they may deem proper. We feel that the judgment of the Colorado Supreme Court should be reversed and the cause remanded with directions for the reinstatement of the first declaratory judgment and decree, in this litigation, entered by the district court of the City and County of Denver, Colorado.

WALTER W. BLOOD,
FRANK N. BANCROFT,
Attorneys for Appellant.

APPENDIX.

REVISED STATUTES, SECTION 5219, AS AMENDED.

(U. S. C. A., Title 12, Sec. 548.)

"The legislature of each state may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several states may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any state of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state coming into competition with the business of national banks: *Provided*, That bonds, notes or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on or according to or measured by the net income of an association, the taxing state may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing state upon mercantile, manufacturing, and business corporations doing business within its limits: *Pro-*

vided, however, That a state which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other states and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the state on condition that it also includes dividends from domestic corporations and may likewise include dividends from National banking associations located without the state on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares of any national banking association owned by nonresidents of any state, shall be taxed by the taxing district or by the state where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any state or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of Sec. 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratifying, or confirming by the states of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section. (R. S., Sec. 5219; Mar. 4, 1923, c. 267, 42 Stat. 1499; Mar. 25, 1926, c. 88, 44 Stat. 223.)"

THE PUBLIC REVENUE SERVICE TAX ACT OF 1937.

(Session Laws of Colorado, 1939, Chapter 158.)

"Be It Enacted by the General Assembly of the State of Colorado:

Chapter 240, Session Laws of Colorado, 1937, is hereby amended and as so amended, it is re-enacted to read as follows:

Section 1. This Act shall be known, and may be cited, as The Public Revenue Service Tax Act of 1937. This Act shall be effective for two years, and shall terminate at midnight on the 30th day of June, A. D. 1941.

Section 2. *Definitions.* (a) The term 'person' includes any individual, firm, co-partnership, joint venture, association, corporation, estate, trust, business trust, receiver, syndicate or any other group or combination acting as a unit in the plural as well as the singular number.

(b) The term 'state treasurer' or 'treasurer' shall mean the Treasurer of the State of Colorado.

(c) The term 'services rendered or performed' shall mean all acts or services rendered, furnished or performed for a valuable consideration by any person engaged in any business or occupation hereinafter designated and defined, when said act or service is rendered, furnished or performed for the ultimate user thereof. The term 'user' shall mean the person for whom or for whose benefit services are rendered or performed.

(d) The term 'business' shall include all activities engaged in or caused to be engaged in with the object of gain, benefit or advantage, direct or indirect.

(e) The term 'taxpayer' shall mean any person obligated to account to the state treasurer for taxes collected or to be collected or due the State under the terms of this Act.

(f) The term 'tax' means either the tax payable by the person procuring or for whose benefit a service is rendered or performed subject to tax, or the aggregate amount of taxes due from the person rendering, performing or furnishing services during the period for which he is required to report his collections, as the context may require.

(g) The term 'value of services' means the price to the user, exclusive of any direct tax imposed by the federal government or by this Act.

(h) The term 'gross taxable services' shall mean the total amount received in money, credits, property or other consideration valued in money from services rendered or performed within this State as herein defined, and embraced within the provisions of this Act; *provided* that the taxpayer may take credit in his report of gross taxable services for an amount equal to the value of services rendered or performed when the full value of services thereof is refunded either in cash or by credit and; *provided further,* that on all services rendered or performed, valued in money, when such services are made under conditional contract, or under other contract or agreement where the payment of the principal sum thereunder be extended over a period longer than sixty (60) days from the date of contract or agreement thereof, only such portion of the value of services thereof may be accounted for the purpose of imposition of the tax imposed by this Act as has actually been received in cash by the taxpayer during the period for which the tax imposed by this Act is due and payable; and *provided further,* that taxes paid on gross taxable services represented by accounts found to be worthless and actually charged off for income tax purposes may be credited upon a subsequent payment of the tax herein provided, but if any such accounts are thereafter collected by the taxpayer, a tax shall be paid upon the amounts so collected.

(i) The words 'includes' and 'including,' when used in a definition or classification contained in this Act, shall not be deemed to exclude other things otherwise within the meaning of the term defined, or otherwise within the classification specified.

Section 3. Services rendered or performed as herein defined to a person engaged in rendering services taxable under this Act or in selling tangible personal property subject to retail sales tax, provided that the cost of such services, directly or indirectly, enter into and become a part of the charges to the ultimate user or purchaser, shall be exempt; provided that, should a dispute arise between the user and the person rendering or performing services as to whether or not any such service rendered is exempt from taxation hereunder, nevertheless, the person performing said services shall collect and the user shall pay such tax, and the person performing said service shall thereupon issue to the user a receipt, or certificate, on forms prescribed by the treasurer, showing the names of the person performing said services and the user, the item purchased, the date, price, amount of tax paid, and a brief statement of the claim of exemption. The person performing said services thereafter may apply to the state treasurer for a refund of such taxes, and it shall then be the duty of the treasurer to determine the question of exemption, subject to review by the courts, as hereinafter provided. It shall be a misdemeanor, punishable as provided in this act, for any person performing said services to fail to collect, or user to fail to pay the tax levied by this act, and on services rendered or performed on which exemption is disputed.

Section 4. (a) It shall be unlawful for any person to engage in the business of rendering or performing services as the same is defined in this act, after the effective date of this act without first having obtained a license therefor, which license shall be granted and issued

by the state treasurer and shall be in force and effect until the thirty-first day of December of the year in which it is issued, unless sooner revoked; except a person who has obtained and who holds a license issued under the provisions of any statute requiring the issuance or securing of a license and a person engaged in the business of rendering or performing services of a professional, technical or scientific nature.

(b) Such license shall be granted or renewed only upon application stating the name and address of the person desiring such a license, the name of such business and the location, including the street number of such business, and such other facts as the state treasurer may require. It shall be the duty of each such licensee on or before January first of each year, to obtain a renewal thereof if the licensee remain in business or liable to account for the tax herein provided, but nothing herein contained shall be construed to empower the state treasurer to refuse such renewal, except revocation for cause of licensee's prior license. For each license issued hereunder a fee of one dollar ($1.00) shall be paid, which fee shall accompany the application together with an additional fifty cents (50c) for filing fee. A further fee of one dollar ($1.00) shall be paid for each year or fraction thereof for which said license is renewed, together with an additional fee of fifty cents (50c) for filing fee; provided that only one-half of said one dollar ($1.00) fee shall be charged on licenses issued after July first of any year.

(c) In case business is transacted at two or more separate places by one person, a separate license for each place of business shall be required.

(d) Each license shall be numbered and shall show the name, residence and place and character of business of the licensee and shall be posted in a conspicuous place in the place of business for which it is issued. No license shall be transferable.

(e) The state treasurer may, on a reasonable notice and after full hearing, revoke the license of any person found by the treasurer to have violated any provision of this act. This power to revoke licenses shall extend only to licenses issued by the state treasurer. Any person engaged in the business of rendering or performing services as the same is defined in this act, without having secured a license therefor as herein provided, shall be guilty of a misdemeanor, and shall be punished accordingly.

(f) Any finding and order of the treasurer revoking the license of any person shall be subject to review by the district court of the district where the business of the licensee is conducted, upon application of the aggrieved party. The procedure for review shall be, as nearly as possible, the same as now provided for the review of findings by writ of certiorari.

(g) No license shall be required for any person engaged exclusively in the business of rendering or performing services which are exempt from taxation under this act.

Section 5. From and after the effective date of this act there is hereby levied and imposed upon the services specified in this act and measured by the amount paid therefor and there shall be collected and paid:

(a) A tax equivalent to two (2) per cent of the value of services rendered or performed by any person engaging or continuing in the business of *conduction* any amusement enterprise, including theatres, picture shows, carnivals, circuses, amusement parks, menageries, dog shows, horse shows, fairs, races, games, dances, dance halls, pool or billiard halls, or any business charging admission for any exhibition, amusement, edification or instruction; *provided* that religious institutions, schools, and colleges shall be exempt from the provisions of this special section.

(b) A tax equivalent to two (2) per cent of the value of services rendered or performed by any person engaging or continuing in the business of contracting for the con-

struction, reconstruction, repair, or improvement, in whole or in part, of any buildings, dwellings, edifices, or any other similar work or performance in which a person covenants or bargains or agrees to perform said work for a stipulated sum, or at cost plus a percentage or additional sum.

(c) A tax equivalent to two (2) per cent of the value of services rendered or performed by any person engaging or continuing in any of the following businesses: barber shops; beauty shops; beauty parlors; cleaning, dyeing, pressing, alteration and repair shops; *launderies*, except hand laundries in a private home; photographic studios; rug cleaning and repair shops; shoe repair shops; shoe shining parlors; hat cleaning; adjustment and credit bureaus, collection agencies and credit reporting services; dental laboratories; duplicating, addressing, mailing, and mailing list service; employment agencies; linen, coat, apron and overall supply service; sign painting shops; window cleaning service; automobile general repair garages; automobile paint shops; automobile radiator shops; automobile rental service; automobile rent storage garages; automobile top and body repair shops; battery and ignition repair shops; tire repair shops; parking lots; blacksmith shops; electrical appliance repair shops; harness and leather goods repair shops; locksmith and gunsmith shops; radio repair shops, upholstering and furniture repair shops; watch, clock and jewelry repair shops; cabinet making and woodworking shops; grist mills; hemstitching, embroidering and buttonholing shops; machine shops; mattress renovating and repair shops; commercial printing shops, commercial lithographing plants, commercial engraving plants, commercial linotyping plants, commercial artists; saw mills and planing mills, tinsmith shops; welding shops; advertising service agencies; banks, finance companies; trust companies and depositories; except as to interest on money loaned, stock or commission brokers or agents; and any other business of a similar

nature in which services (not professional) are performed on a price or fee basis; provided, however, that there shall be excepted and exempt from taxation under this act services rendered or performed by any person engaging or continuing in any of the following businesses: hospitals, sanitaria, homes for convalescents and cemeteries.

(d) A tax equivalent to two (2) per cent of the value of services rendered or performed by any person engaging or continuing in the business of operating a hotel, an apartment hotel, cottage camp, a lodging house or other similar establishment operated for the accomodation of the general public for charge and having facilities for more than ten (10) occupants, except services for meals and cover charges, if any, furnished at any such establishment.

(e) A tax equivalent to two (2) per cent of the value of services rendered or performed by any person engaging in business of a professional, technical or scientific nature, where services are rendered or performed on a fee basis, or for consideration in the nature of a retainer, including but not limited by: abstractors; accountants; architects; barbers; cosmotologists; engineers, pharmacists; real estate brokers; shorthand reporters; attorneys-at-law; lobbyists; auctioneers; and any other business of a professional, technical or scientific nature in which services are rendered or performed on a price or fee basis or for a consideration in the nature of a retainer, except the services of a minister, priest or rabbi or of any service of a religious nature, and except the services of chiropractors, osteopaths; physicians; surgeons; dentists; embalmers; nurses; optometrists; undertakers; chiropodists; hospitals; cemeteries; or state licensed veterinarians.

Section 6. (a) Every person rendering or performing services shall be liable and responsible for the payment of the entire amount of the said two (2) per cent tax imposed and payable upon his total taxable services rendered or performed, and shall, before the fifteenth day of each

month make a return to the state treasurer for the preceding calendar month, and remit all taxes collected and due the state from him, to the state treasurer, less three (3) per cent thereof to cover the expense of the person rendering or performing services, in the collection and remittance of said tax. Such return, verified by oath or affirmation of the taxpayer or his duly authorized agent, shall contain such information and be made in such manner and upon such forms as the state treasurer may prescribe and the state treasurer may extend the time for making returns and paying the taxes due under such reasonable rules and regulations as he may prescribe, but no such extension shall be for a greater period than is provided for in subdivision (e) of this section. The burden of proving that any person is exempt from collecting the tax on any services rendered or performed and paying same to the state treasurer, or from making such returns, shall be on the person rendering or performing such services under such reasonable requirements of proof as the state treasurer may prescribe.

(b) Persons rendering or performing services shall, as far as practicable, add the tax imposed under this act, or the average equivalent thereof, to the value of services or charges showing such tax as a separate and distinct item and when added such tax shall constitute a part of such value of service or charge, shall be a debt from the user to the person rendering or performing service until paid, and shall be recoverable at law in the same manner as other debts.

(c) To provide uniform methods of adding the tax, or the average equivalent thereof, to the value of service, it shall be the duty of the state treasurer to formulate and promulgate after hearing appropriate rules and regulations to effectuate the purpose of this section.

(d) It shall be unlawful for any person rendering or performing service to advertise or hold out or state to the

public or to any user, directly or indirectly, that the tax or any part thereof imposed by this act will be assumed or absorbed by him or that it will not be added to the value of service rendered, or if added that it or any part thereof will be refunded. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

(e) If the accounting methods regularly employed by the person rendering or performing service in the transaction of his business, or other conditions, are such that reports of services rendered or performed made on a calendar month basis will impose unnecessary hardship, the state treasurer may, upon written request of the person rendering or performing services, accept reports at such intervals as will in his opinion better suit the convenience of the taxpayer and will not jeopardize the collection of the tax. Provided, however, the state treasurer may by rule permit taxpayers whose monthly tax collected is less than twenty dollars ($20.00) to make returns and pay taxes at intervals not greater than every three (3) months.

(f) For the purpose of more efficiently securing the payment, collection and accounting of the taxes provided for under this act, the state treasurer in his discretion, by proper rules and regulations, may provide for the issuance of tokens or other appropriate devices to facilitate collections.

(g) A person doing business in two or more places or locations, taxable hereunder, may file one return covering all such business activities engaged within this state.

(h) If any person shall, during any reporting period, collect as a tax an amount in excess of two (2) per cent of his total services rendered or performed, he shall remit to the state treasurer the full net amount of the tax herein imposed and also such excess; and if any person under the pretense of representation of collecting the tax imposed by this act shall collect during any reporting period an amount in excess of two (2) per cent of his total

services rendered or performed the retention of such excess or any part thereof, or the intentional failure to remit punctually to the state treasurer, the full amount required to be remitted by the provisions of this chapter, is declared to be unlawful and shall constitute a misdemeanor.

Section 7. (a) All services rendered or performed, the rendering or performing of which is now subject to an excise tax under the laws of this state, and all services rendered or performed to the United States Government, to the State of Colorado, its department and institutions, and the political subdivisions thereof in their governmental capacities only and all services rendered or performed to or by religious, charitable, educational and eleemosynary institutions, in the conduct of their regular religious, charitable, educational or eleemosynary functions and all services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or laws of the United States, or the State of Colorado, shall be exempt from taxation under this act; provided that should a dispute arise between the person rendering or performing services and the user or state treasurer as to whether or not any services rendered or performed are exempt from taxation hereunder, nevertheless the person rendering or performing services shall collect and the user shall pay such tax, and the person rendering or performing services shall thereupon issue to the user a receipt or certificate, on forms prescribed by the treasurer, showing the names of the person rendering or performing services and the user, the items of services rendered, the date, the value of services, the amount of tax paid and a brief statement of the claim of exemption. The user thereafter may apply to the state treasurer for a refund of such taxes, and it shall be the duty of the treasurer to determine the question of exemption, subject to review by the courts, as hereinafter provided; provided further, that a refund shall be made, or a credit allowed, for the tax so paid under dis-

pute by any user who has an exemption as in this act provided. Such refund shall be made by the state treasurer after compliance with the following conditions precedent:

(b) Applications for refund must be made within sixty (60) days after the rendering or performance of services whereon an exemption is claimed and must be supported by the affidavit of the user accompanied by the original paid invoice, receipt and certificate issued by the person rendering or performing services, and be made upon such forms as shall be prescribed and furnished by the state treasurer, which forms shall contain such information as said state treasurer shall prescribe. Upon receipt of such application the treasurer shall examine same with all due speed and shall give notice to the applicant by order in writing of his decision thereon. Aggrieved applicants may, within ten (10) days after such decision is mailed to them, petition the treasurer for a hearing on the claim in the manner provided in this act. The right of any person to a refund under this article shall not be assignable and such application for refund must be made by the same person who paid the tax thereon as shown in the invoice, receipt or certificate.

(c) Any applicant for refund under the provisions of this section, or any other person, who shall make any false statement in connection with an application for a refund of any taxes shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punishable by a fine of *no* more than five hundred dollars ($500.00) or by imprisonment in the county jail of not more than ninety (90) days, or by both such fine and imprisonment.

(d) If any person be convicted under the provisions of this section, such convictions shall be 'prima facie' evidence that all refunds received by such person during the current year were obtained unlawfully and the state treasurer is hereby empowered and directed to bring appropriate action for recovery of such refunds, a brief sum-

mary statement of the above mentioned penalties shall be printed on each form application for refund.

(e) The burden of proving that services rendered and performed, on which tax refunds are claimed, are exempt from taxation under this act, shall be on the one making such claim under such reasonable requirements of proof as the state treasurer may prescribe. Should the applicant for refund be aggrieved at the final decision of the treasurer, he may proceed to have same reviewed by the courts in the manner provided for review of other decisions of the treasurer as provided in this act; except that such review shall be in the district court of the City and County of Denver.

Section 8. (a) Except in accordance with judicial order or as otherwise herein provided, the State Treasurer, his agents, clerks, and employees shall not divulge any information gained by it from any return filed under the provisions of this act. The officials charged with the custody of such returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the State Treasurer in an action or proceeding under the provisions of this act to which it is a party, or on behalf of any party to any action or proceeding under the provisions of this act when the report of facts shown thereby are directly involved in such action or proceeding, in either of which events the court may require the production of, and may admit in evidence, so much of said reports or of the facts shown thereby, as are pertinent to the action or proceeding and no more. Nothing herein contained shall be construed to prohibit the delivery to a person or his duly authorized representative of a copy of any return or report filed in connection with his tax nor to prohibit the publication of statistics so classified as to prevent the identification of particular reports or returns and the items thereof, or the inspection by the At-

torney General or other legal representative of the state of the report or return of any person who shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding is contemplated or has been instituted under this act. Reports and returns shall be preserved for three (3) years and thereafter until the State Treasurer orders them destroyed.

(b) Any state officer or employee or any member, officer, or employee of the State Treasurer, who shall divulge any such information in any manner, except in accordance with proper judicial order, or as otherwise provided by law, shall be guilty of a misdemeanor.

Section 9. (a) As soon as practicable after the return is filed, the State Treasurer shall examine it; if it then appears that the correct amount of tax to be remitted is greater or less than that shown in the return to be due, the tax shall be recomputed. If the amount exceeds that which is due, the excess shall be refunded or credited against any subsequent remittance from the same persons. If the amount paid is less than the amount due, the difference, together with interest thereon at the rate of one-half of one per cent per month from the time the return was due, shall be paid by the person rendering or performing services within ten (10) days after written notice and demand to him is received from the State Treasurer.

(b) If any part of the deficiency is due to negligence or intentional disregard of authorized rules and regulations with knowledge thereof, but without intent to defraud, there shall be added ten per cent (10%) of the total amount of the deficiency and interest in such case shall be collected at the rate of one (1) per cent per month on the amount of such deficiency from the time the return was due, from the person required to file the return, which interest and addition shall become due and payable ten (10) days after written notice and demand to him by the Treasurer. If

any part of the deficiency is due to fraud with the intent to evade the tax, then there shall be added fifty per cent (50%) of the total amount of the deficiency and in such case, the whole amount of the tax unpaid, including the additions, shall become due and payable ten (10) days after the written notice and demand by the State Treasurer and an additional one per cent (1%) per month on said amount shall be added from the date the return was due until paid.

(c) For the purpose of ascertaining the correctness of any return, or for the purpose of determining the amount of tax due from any person, the State Treasurer or his duly authorized deputies, may hold investigations and hearings concerning any matters covered by this act and may examine any relevant books, papers, records or memoranda of any such person and may require the attendance of such person or any officer or employee of such person, or of any person having knowledge of such services rendered, and may take testimony and require proof for its information. The Treasurer and his authorized deputies shall have power to administer oath to such persons.

(d) All subpoenas issued under the terms of this act may be served by any person of full age. The fees of witnesses for attendance and travel shall be the same as the fees of witnesses before the district courts of this state; such fees to be paid when the witness is excused from further attendance. When the witness is subpoenaed at the instance of the State Treasurer, such fees shall be paid in the same manner as other expenses of the State Treasurer, and when the witness is subpoenaed at the instance of any party to any such proceeding, the State Treasurer may require that the cost of service of the subpoena and the fee of the witness be borne by the party at whose instance the witness is summoned. In such case, the State Treasurer, in his discretion, may require a deposit to cover the cost of such service and witness fees.

A subpoena issued as aforesaid shall be served in the same manner as a subpoena issued out of a court of record.

(e) Any district court of this state, or any judge thereof, either in term time or vacation, upon the application of the State Treasurer, may compel the attendance of witnesses, the production of books, papers, records or memoranda and the giving of testimony before the State Treasurer or any member or officer thereof, by an attachment for contempt, or otherwise, in the same manner as production of evidence may be compelled before said court.

(f) The State Treasurer or any party in an investigation or hearing before the State Treasurer, may cause the depositions of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in courts of this state, and to that end compel the attendance of witnesses and the production of books, papers, records or memoranda.

Section 10. It shall be the duty of every person engaging or continuing in business as designated and defined in this act in this state, to keep and preserve suitable records for a period of three years of all services rendered by him and such other books or accounts as may be necessary to determine the amount of tax for the collection of which he is liable under the provisions of this act.

Section 11. (a) The tax imposed by this act shall be a first and prior lien upon the stock of goods and business fixtures of any person rendering or performing services or other person liable for the payment of taxes under this act and shall take precedence over other liens or claims of whatsoever kind or nature, except as to pre-existing liens on property not used in performing services as provided herein; and any person rendering or performing services who shall sell out his business or stock of goods, or shall quit business, shall be required to make out the return as provided in this act, within ten (10) days

after the date he sold out his business or stock of goods, or quit business, and his successor in business shall be required to withhold sufficient of the purchase money to cover the amount of said taxes due and unpaid until such time as the former owner shall produce a receipt from the State Treasurer showing that the taxes have been paid or a certificate that no taxes are due. If the purchaser of a business or stock of goods shall fail to withhold the purchase money as above provided and the taxes shall be due and unpaid after the ten (10) day period allowed, he, as well as the vendor, shall be personally liable for the payment of the taxes unpaid by the former owner. Likewise, anyone who takes any stock of goods or business fixtures of any person rendering or performing services, shall take same subject to the lien for any delinquent taxes for rendering or performing services owned by such person and shall be liable for the same up to the value of the property taken.

(b) Whenever the business or property of any taxpayer subject to this act shall be placed in receivership, bankruptcy or assignment for the benefit of creditors, or seized under distraint for property taxes, all taxes, penalties and interest imposed by this act shall be a prior and preferred claim against all the property of said taxpayer, except as to pre-existing liens on property not used in performing services as provided herein, and no sheriff, receiver, assignee, or other officer shall sell such property of any person subject to this act under process or order of any court, without first ascertaining from the State Treasurer the amount of any taxes due and payable under this act, and if there be any such taxes due, owing or unpaid, it shall be the duty of such officer to first pay the amount of said taxes out of the proceeds of said sale before making payment of any moneys to any judgment creditor or other claims of whatsoever kind or nature, except the costs of the proceedings.

Section 12. (a) All sums of money paid by the user to the person rendering or performing services as taxes imposed by this chapter shall be and remain public money, the property of the State of Colorado, in the hands of such person rendering or performing services and he shall hold the same in trust for the sole use and benefit of the State of Colorado until paid to the State Treasurer, as herein provided, and for failure to so pay to the State Treasurer, such person rendering or performing services shall be punished as provided by law.

(b) If a person neglects, or refuses to make a return in payment of the tax as required by this act, the State Treasurer shall make an estimate, based upon such information as may be available, of the amount of taxes due for the period or periods for which the taxpayer is delinquent; and upon the basis of such estimated amount, compute and assess in addition thereto, a penalty equal to ten per cent (10%) thereof, together with interest in such delinquent taxes at the rate of one per cent (1%) per month from the date when due. Promptly thereafter, the State Treasurer shall give to the delinquent taxpayer written notice of such estimated taxes, penalty and interest, which notice must be served personally or by registered mail. Such estimate shall thereupon become an assessment, and such assessment shall be final and due and payable from the taxpayer to the State Treasurer ten (10) days from the date of service of the notice or the date of mailing by registered mail; *provided, however,* that within said ten (10) day period such delinquent taxpayer may petition the State Treasurer for a revision or modification of such assessment, and shall, within such ten (10) day period, furnish the State Treasurer the facts and correct figures showing the correct amount of such taxes. Such petition shall be in writing, and the facts and figures submitted shall be submitted either in writing or orally, and shall be given under oath of said taxpayer. Thereupon the State Treasurer shall modify such assessment in accordance with the facts sub-

mitted, which fact he deems correct. Such assessment shall be considered the final order of the State Treasurer, and may be reviewed by writ of certiorari as provided in this act, provided that the taxpayer give written notice to the State Treasurer of such intention within five (5) days after receipt of the final order of assessment.

(c) If any taxes, penalty or interest imposed by this act and shown due by returns filed by the taxpayer or as shown by assessments duly made as provided herein, are not paid within five (5) days after the same are due, the State Treasurer may issue a notice, setting forth the name of the taxpayer, the amount of the tax, penalties and interest, the date of the accrual thereof, and that the State of Colorado claims a first and prior lien therefor on the real and tangible personal property of the taxpayer except as to preexisting liens on property not used in performing services as provided herein. Said notice shall be on forms prepared by the State Treasurer, and shall be verified by him or by his duly qualified deputy, or any duly qualified agent of the State Treasurer, whose duties are the collection of such tax, and may be filed in the office of the clerk and recorder of any county in the state in which the taxpayer owns real or tangible personal property, and the filing of such notice shall create such lien on such property in that county and constitute notice thereof. After said notice has been filed, or concurrently therewith, or at any time when taxes due are unpaid, whether such notice be filed or not, State Treasurer may issue a warrant under the official seal of the Treasurer of the State of Colorado directed to any duly authorized revenue collector, or to the sheriff of any county of the state, commanding him to levy upon, seize and sell sufficient of the real and personal property of the tax debtor found within his county for the payment of the amount due, together with interest, penalties and costs, as now or hereafter may be provided by law.

(d) Such revenue collector or the sheriff shall forthwith levy upon sufficient of the property of the taxpayer and said property so levied upon shall be sold in all respects with like effect and in the same manner as is prescribed by law in respect to executions against property upon judgment of a court of record, and the remedies of garnishments shall apply. The sheriff shall be entitled to such fees in executing such warrant, as are now allowed by law for similar services.

(e) Any lien for taxes as shown on the records of the county clerks and recorders as herein provided, shall, upon payment of all taxes, penalties and interest covered thereby, be released by the State Treasurer in the same manner as mortgages and judgments are released.

(f) It shall be the duty of any county clerk to whom such notices are sent, to file and record the same without cost or charge.

(g) The State Treasurer may also treat any such taxes, penalties or interest due and unpaid as a debt due the state from the vendor. In case of failure to pay the tax, any portion thereof, or any penalty or interest thereon when due, the State Treasurer may recover at law the amount of such taxes, penalties and interest in such justice, county or district court of the county wherein the taxpayer resides or has his principal place of business having jurisdiction of the amounts sought to be collected. The return of the taxpayer or the assessment made by the State Treasurer, as herein provided, shall be 'prima facie' proof of the amount due. Such actions may be actions in attachment, and writs of attachment may be issued to the constable or sheriff as the case may be and in any such proceeding no bond shall be required of the State Treasurer, nor shall any constable or sheriff require of the State Treasurer an indemnifying bond for executing the writ of attachment, or writ of execution upon any judgment entered in such proceedings; and the State Treasurer may

prosecute appeals or writs of error in such cases without the necessity of providing bond therefor. It shall be the duty of the Attorney General or any district attorney when requested by the State Treasurer, to commence action for the recovery of taxes due under this act, and this remedy shall be in addition to all other existing remedies or remedies provided in this act, and the provisions of this section and Section 11 shall apply to taxes now due, as well as those becoming due hereafter. The State Treasurer may, for good cause shown, waive any penalty *impared* by this act. A penalty shall be deemed any charge in excess of six (6) per cent interest per annum.

Section 13. If any person feels aggrieved by the assessment made upon him by the State Treasurer, he may apply to the State Treasurer by petition in writing within ten (10) days after the notice is mailed to him for a hearing and a correction of the amount of the tax so assessed, in which petition he shall set forth the reasons why such hearing should be granted and the amount by which such tax should be reduced. The State Treasurer shall notify the petitioner in writing of the time and place fixed by him for such hearing. After such hearing, the State Treasurer shall make such order in the matter as is just and lawful and shall furnish a copy of such order to the petitioner.

Section 14. (a) Every decision of the State Treasurer shall be in writing and notice thereof shall be mailed to the person rendering or performing services within ten (10) days, and all such decisions shall become final upon the expiration of thirty (30) days after notice of such decision shall have been mailed to the person rendering or performing services, unless proceedings are taken within said time for review thereof as hereinafter provided.

(b) The district court of the county wherein the taxpayer resides or has his principal place of business shall have original jurisdiction in proceedings to review all questions of law and fact determined by the State Treasurer

in administering the provisions of this act by writ of certiorari to the State Treasurer. If the taxpayer is not a resident of this state or has no principal place of business in this state, such venue shall be in the City and County of Denver. Such writs of certiorari shall be issued by the clerk of the court upon the duly verified petition of the taxpayer, filed within twenty (20) days after notice of the decision of the State Treasurer in any such matter. The writ shall be served within five (5) days after its issuance and shall be returnable, at such times as the court may determine, not less than ten (10) days nor more than twenty (20) days after the date when the writ was issued. The State Treasurer shall forthwith certify the record of its proceedings to said court. The procedure therein shall be in conformity with the code of civil procedure.

(c) Before making application to the district court for a writ of certiorari, the party making such application shall file with the State Treasurer a bond in twice the amount of the unpaid taxes, interest and other charges audited and stated in the determination and decision of the State Treasurer with surety as is now provided in other cases on appeal, or at his option may deposit lawful money of the United States in the same manner as before provided.

(d) The decision of the district court may be reviewed in the Supreme Court upon writ of error by any party.

Section 15. (a) All notices required to be given to the person rendering or performing services, under the provisions of this act, shall be in writing and if mailed postpaid by registered mail, 'return receipt requested' to him at his last known address, shall be sufficient for the purposes of this act.

(b) Every hearing before the State Treasurer shall be held in the county wherein the taxpayer resides or has his principal place of business, unless the taxpayer consents that such hearing shall be in the City and County of Denver.

Section 16. The license and tax imposed by this act shall be in addition to all other licenses and taxes imposed by law, except as herein otherwise provided.

Section 17. It shall be unlawful for any person rendering or performing services to refuse to make any return provided to be made in this act or to make any false or fraudulent return or false statement on any return or fail and refuse to make payment to the State Treasurer of any taxes collected or due the state, or in any manner evade the collection and payment of the tax, or any part thereof, imposed by this act, or for any person to fail or refuse to pay such tax, or evade the payment thereof, or to aid or abet another in any attempt to evade the payment of the tax imposed by this act. Any person violating any of the provisions of this section shall be guilty of a misdemeanor. Any corporation making a false return or a return containing a false statement as aforesaid, shall be guilty of a misdemeanor. Any court of competent jurisdiction, including the justice court, of the county in which the offender resides, or, if a corporation, then the county of its principal place of business, shall have jurisdiction to enforce this section.

In addition to the penalties, provided by this act, any person who shall knowingly and willfully swear to or verify any false statement shall be guilty of the offense of perjury and on conviction thereof shall be punished in the manner provided by law.

Section 18. Any person guilty of a misdemeanor, as defined and declared in this act, upon conviction, shall be punished by a fine of not exceeding One Thousand Dollars ($1,000.00), or by imprisonment not exceeding six (6) months in the county jail, or both such fine and imprisonment.

Section 19. The administration of this act is vested in and shall be exercised by the State Treasurer, who shall administer this act by means of or through the department

or agency now or hereafter designated or established for the purposes of collecting the excise taxes provided by and enforcing the provisions of the 'emergency retail sales tax act of 1935.' The State Treasurer shall prescribe forms and reasonable rules and regulations in conformity with this act for the making of rules and for the ascertainment, assessment, and collection of the taxes imposed hereunder and for the proper administration and enforcement of this act. General and special rules may be adopted, amended, or rescinded by the State Treasurer only after public hearing or trial to be heard thereon, of which proper notice has been given. General rules shall become effective ten (10) days after filing with the Secretary of State and publication in one or more newspapers of general circulation in this state. Special rules shall become effective ten (10) days after notification to or mailing to the last known address of the individual or concerns affected thereby. Regulations may be adopted, amended, or rescinded by the State Treasurer and shall become effective in the manner and at the time prescribed by the State Treasurer. The State Treasurer shall cause to be printed for distribution to the public the general rules and regulations as herein provided.

Section 20. (a) It is the specific purpose and intention of the General Assembly in the passage and adoption of this act to provide additional Public Revenue to defray the expenses of the operation of state government, and to provide funds for general relief and other governmental purposes, and the revenue derived under this act shall, from time to time, upon the receipt thereof, by the State Treasurer, be deposited by him in the General Fund of the state. Three per cent (3%), or so much thereof as may be necessary, of the funds derived from this act, are hereby appropriated and allocated for the administrative expenses of the state in administering this act. The costs and expenses of administration and enforcement shall be paid out of said three per cent (3%), upon vouchers issued by the State Treasurer and warrants of the Auditor of State. The

remainder of said funds shall be appropriated for the purposes specified by the General Assembly.

Section 21. Any penalty, forfeiture or liability, either civil or criminal, which shall have been incurred under former statutes relating to an excise tax on services shall be held as remaining in force for the purpose of sustaining any and all proper actions, suits, proceedings and prosecutions for the enforcement of such penalty, forfeiture or liability, as well as for the purpose of sustaining any judgment, decree or order, which can or may be rendered, entered, or made in such actions, suits, proceedings or prosecutions, imposing, inflicting or declaring such penalty, forfeiture or liability, likewise any remedy for the collection of any liability, afforded by the prior laws shall continue in force for the purpose of the collection of such liability.

Section 22. If any section, subsection, sentence, clause or phrase of this act is, for any reason, held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portions *or* this act. The General Assembly hereby declares that it would have passed this act, and each section, subsection, sentence, clause or phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared invalid or unconstitutional.

Section 23. The General Assembly hereby finds, determines and declares that this act is necessary for the immediate preservation of the public peace, health and safety.

Section 24. In the opinion of the General Assembly an emergency exists; therefore, this act shall take effect and be in force from and after its passage.

APPROVED: May 1, 1939."